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THE BUCK DOES NOT STOP HERE: SUPERVISORY LIABILITY IN SECTION 1983 CASES

*Kit Kinports**

The appropriate standard for supervisory liability in Section 1983 cases has been a source of considerable disagreement among federal courts of appeals. In the absence of established Supreme Court authority on the subject, courts have rejected vicarious and negligence liability in favor of a higher culpability requirement, but they have not agreed on precisely what form this higher standard should take. In this article, Professor Kinports addresses the need for a uniform standard consistent with the statute's twin goals of compensating the victims of constitutional violations and deterring constitutional infractions.

Professor Kinports notes at the outset that lower courts have unjustifiably relied on Supreme Court opinions discussing state-of-mind requirements for particular constitutional violations and cases addressing municipal liability in Section 1983 suits in formulating the requirements for supervisory liability. She then identifies five factors considered by courts in determining whether supervisory liability should be imposed on the facts of particular cases: (1) the existence of prior similar incidents; (2) the supervisor's response to such incidents; (3) the supervisor's response to the specific incident involved in the suit; (4) the extent to which the supervisor caused the violation; and (5) the supervisor's awareness of the constitutional wrongdoing. Application of these factors has led to inconsistent results in similar cases, the author argues. She further contends that courts in general have too readily ruled in favor of supervisory officials.

As a substantive matter, Professor Kinports asserts, the standard of supervisory liability should be a national one. In addition, the author advocates a meaningful standard of culpability, which she concludes is best satisfied by a negligence standard. Liability for supervisory negligence is consistent with Supreme Court precedent as well as Section 1983's causation requirement, and concerns about protecting blameless supervisors are already assuaged by the qualified immunity defense

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available to executive branch officials, which the author suggests should shield supervisors if a reasonable public official in their position would not have realized that the actions taken by their subordinates violated the Constitution. Professor Kinports thus concludes that it makes sense to hold supervisory officials accountable for constitutional violations caused by their negligence in supervising, training, or disciplining their subordinates.

In March of 1991, the nation watched in horror as the videotape depicting the brutal beating of Rodney King, an African American man, at the hands of more than a dozen white Los Angeles police officers played over and over on television screens across the country.¹ A year later, the country was likewise shocked when a California jury refused to convict the only four police officers charged in connection with the beating.² The riots that accompanied those verdicts³ and the subsequent conviction of two of the officers on federal charges⁴ also

1. In the early morning hours of March 3, 1991, police officers observed King's car driving at an excessive rate of speed. The police apprehended King following a high-speed chase, and then repeatedly kicked and beat him as he lay on the ground. A bystander happened to videotape the beating. See Seth Mydans et al., *Seven Minutes in Los Angeles—A Special Report*, N.Y. TIMES, Mar. 18, 1991, at A1; Hector Tobar & Leslie Berger, *Tape of L.A. Police Beating Suspect Stirs Public Furor*, L.A. TIMES, Mar. 6, 1991, at A1.

As a result of the beating, King's skull was fractured in a number of places, his eye socket and cheekbone were shattered, one of his legs was broken, he suffered a concussion, and his face was partially paralyzed. See Mydans et al., *supra*, at A1.

King testified that he heard the officers chanting racial epithets during the beating. See John L. Mitchell & Shawn Hubler, *King Gets Award of \$3.8 Million*, L.A. TIMES, Apr. 20, 1994, at A1. Although the police denied that charge, police department transcripts indicated that racial slurs about another incident were transmitted shortly before the assault on King from the car assigned to two of the police officers charged in connection with King's beating. See Tracy Wood & Sheryl Stolberg, *Patrol Car Log in Beating Released*, L.A. TIMES, Mar. 19, 1991, at A1.

2. The four officers were Sergeant Stacey Koon, the officer in charge at the scene, who ordered the beating and fired an electric taser stun gun at King; Officer Laurence Powell, who delivered most of the blows; Officer Timothy Wind, who kicked King and struck him with a baton; and Officer Theodore Briseno, who stomped on King's face and neck. See John Hurst & Leslie Berger, *Crisis in the LAPD*, L.A. TIMES, Feb. 3, 1992, at B1; Mydans et al., *supra* note 1, at A1.

Each of the four defendants was acquitted on the charge of assault with a deadly weapon. The jury deadlocked on the question whether Powell was guilty of excessive use of force by a police officer, but acquitted the other three defendants of that charge. See Richard A. Serrano & Tracy Wilkinson, *All 4 in King Beating Acquitted*, L.A. TIMES, Apr. 30, 1992, at A1.

3. The acquittal of the four officers led to "the worst urban riots in a century." Mitchell & Hubler, *supra* note 1, at A1. During the riots, more than 40 people were killed, more than 2,000 were injured, and almost one billion dollars worth of property was destroyed. See *Koon v. United States*, 116 S. Ct. 2035, 2041-42 (1996).

4. All four officers were charged under 18 U.S.C. § 242 (1994), the criminal counterpart to the civil cause of action provided by 42 U.S.C. § 1983 (1994). Section 242 makes it a federal crime for a state official to willfully deprive another of her constitutional rights. Koon and Powell were convicted on this charge, but the other two officers were acquitted. See Jim Newton, *2 Officers Guilty, 2 Acquitted*, L.A. TIMES, Apr. 18, 1993, at A1.

Although Koon and Powell each faced a maximum sentence of 10 years' imprisonment and a \$250,000 fine, see *id.*, and the federal sentencing guidelines prescribed a sentence in the range of 70 to 87 months for the crime, see *United States v. Koon*, 833 F. Supp. 769, 785 (C.D. Cal. 1993), the two officers were sentenced to 30 months in prison. On appeal, their convictions were affirmed, but the court remanded for resentencing because, in its view, the district judge had

received a great deal of media scrutiny. Comparatively little attention was paid, however, to the civil suit that Rodney King filed under Section 1983⁵ against the City of Los Angeles, Los Angeles Police Chief Darryl Gates, and fourteen other police officers. And almost no one noticed when the federal district court dismissed the portion of the Section 1983 case involving Police Chief Gates.⁶

In the context of the civil suit, the City of Los Angeles conceded that King's constitutional rights had been violated. After a trial limited to the issue of damages, a federal jury ordered the city to pay King \$3.8 million in compensatory damages.⁷ During the punitive damages phase of the trial, which focused on the culpability of the individual defendants,⁸ Federal District Court Judge John G. Davies dismissed Gates from the suit after hearing King's evidence.⁹ The judge concluded that King had failed to prove that Gates "acted maliciously or out of spite or was callously indifferent to the rights and safety of others. . . . Bad management is not enough. . . . Allowing racism is not enough. Poor supervision is not enough," the judge noted.¹⁰

erred in departing downward from the sentencing guidelines. See *United States v. Koon*, 34 F.3d 1416 (9th Cir. 1994). The Supreme Court disagreed with much of the court of appeals' reasoning on the sentencing question, and the case has now been remanded back to the trial court. See *Koon*, 116 S. Ct. at 2048-54.

5. 42 U.S.C. § 1983 (1994). This statute creates a civil cause of action in federal court against "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." *Id.*

6. See John L. Mitchell, *Judge Drops Gates from King Lawsuit*, L.A. TIMES, May 10, 1994, at A1.

7. See Mitchell & Hubler, *supra* note 1, at A1.

8. See *id.* Punitive damages may not be assessed against a municipality in a Section 1983 case, see *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), but may be awarded against an individual defendant who acted recklessly or with callous indifference to the plaintiff's rights. See *Smith v. Wade*, 461 U.S. 30, 56 (1983).

9. The jury eventually denied King's request for punitive damages altogether, concluding that Koon and Powell had acted with malice but had already been punished sufficiently for their misconduct and that the other officers had not violated King's constitutional rights. See John L. Mitchell, *Punitive Damages from Police in King Beating Rejected*, L.A. TIMES, June 2, 1994, at A1.

10. Mitchell, *supra* note 6, at A1 (quoting district court). But cf. INDEPENDENT COMM. ON THE LOS ANGELES POLICE DEPT., REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT at iii, iv (1991) (Christopher Commission report) (report issued by commission created in the wake of the King beating found "a significant number" of Los Angeles police officers "who repetitively use excessive force against the public and persistently ignore the written guidelines of the Department regarding force" and concluded that the police department's "failure to analyze and act upon these revealing data evidences a significant breakdown in the management and leadership of the Department"); Mark Curriden, *When Good Cops Go Bad*, A.B.A. J., May 1996, at 62, 64-65 (noting that Los Angeles is "the king of the payouts" in police brutality suits and that its police department is currently being investigated by the Justice Department for engaging in a pattern of civil rights violations); Paul Hoffman, *The Feds, Lies, and Videotape: The Need for an Effective Federal Role in Controlling Police Abuse in Urban America*, 66 S. CAL. L. REV. 1455, 1471-82 (1993) (arguing that the beating of Rodney King was part of a pattern of abuse by Los Angeles police officers, directed in particular against young African American and Latino men, and that the police department tolerated that abuse); Seth Mydans, *Era in Los Angeles Ends as Chief Quits*, N.Y. TIMES, June 27, 1992, at A6 (describing

Judge Davies's decision is not particularly unusual. Although the federal courts have failed to adopt a consistent standard of liability for supervisors in Section 1983 cases, they have been fairly consistent in allowing supervisors to escape liability for their subordinates' constitutional wrongs. These cases are the focus of this article.

The federal courts have uniformly acknowledged that Section 1983—by imposing liability on any state official who “subjects” the plaintiff to a deprivation of constitutional rights or “causes [her] to be subjected” to such a deprivation¹¹—envisioned that supervisory officials can be held liable for their subordinates' constitutional misdeeds in cases where they did not actively participate in, or even witness, the constitutional violation. But the courts have not agreed on the precise legal standard that ought to apply in such circumstances.

As in many areas of Section 1983 jurisprudence, neither the brief text of the statute nor the legislative history provides definitive guidance on the question of supervisory liability. The terms “cause” and “subject” that appear in the statute suggest that some level of culpability is required for any defendant, including a supervisor, and the Supreme Court has endorsed that conclusion. Beyond that, however, the courts must necessarily balance the need to provide a meaningful remedy to those whose rights have been infringed and a meaningful deterrent to future violations against the competing concerns that the federal judiciary not unduly inhibit public officials in the performance of their duties or otherwise impermissibly extend federal jurisdiction into areas best left for resolution on the state and local level.

The latter concerns have played a major role in the evolution of the qualified immunity defense that individual defendants, including supervisors, may assert in Section 1983 suits. Thus, the policy or prudential concerns that may be driving the courts to reject Section 1983 claims against supervisors are already addressed by this broad and oft-invoked affirmative defense, which immunizes defendants in any case where the constitutional rights asserted by the plaintiff are not clearly established. The countervailing remedial and deterrent considerations, coupled with the statute's text, suggest that courts should impose liability on supervisors so long as they were personally culpable—that is, at least negligent—and so long as their negligence caused the deprivation of the plaintiff's rights. Under this standard, if Rodney King could prove that Darryl Gates had been a bad manager,

report issued by Amnesty International, which found “a pattern of excessive force and racial bias” in the Los Angeles Police Department that the organization labeled a “human rights scandal”).

Although Gates was absolved from liability in the Section 1983 suit, King's beating and the Christopher Commission's negative report ultimately forced Gates to retire in June of 1992. See John L. Mitchell, *Gates Says He Was a Model for LAPD Officers*, L.A. TIMES, May 4, 1994, at B3; Sheryl Stolberg, *Once Synonymous, Gates, LAPD Go Separate Ways*, L.A. TIMES, June 28, 1992, at A1.

11. 42 U.S.C. § 1983 (1994); see *supra* note 5.

tolerant of departmental racism, and a poor—i.e., negligent—supervisor, and that these shortcomings led to the brutal beating inflicted by Gates's subordinates, King should have been allowed to proceed with his claims against Gates. If Gates was not entitled to qualified immunity—if the beating violated King's clearly established constitutional rights and Gates, as a reasonable manager, should have known that—there is no justification for imposing a standard of supervisory culpability that absolves him from liability.

After summarizing the few Supreme Court opinions touching on this question, part I of this article describes the different standards of supervisory liability currently being applied by the federal courts of appeals. Part II examines the rationales the courts have used to justify adopting the various standards they have chosen and concludes that no principled explanation has been advanced for any of the competing standards. Part III then critiques the court decisions applying the various standards of supervisory liability, arguing that the courts have not consistently applied the factors that are relevant in determining whether a supervisor ought to be subjected to liability on the facts of a particular case. Finally, part IV advocates that the confusion surrounding this area of the law be resolved by adopting a negligence standard of liability for supervisory officials and giving effect to the prudential concerns that militate against liability primarily when considering the defendant's qualified immunity defense.

I. THE VARYING STANDARDS OF SUPERVISORY LIABILITY

A. *The Supreme Court Precedents*

The Supreme Court has provided surprisingly little guidance on the reach of supervisory liability in Section 1983 cases. In fact, the only Supreme Court decision directly focusing on this issue is a five-to-four opinion issued twenty years ago in *Rizzo v. Goode*.¹² In that case, the plaintiffs sued the Mayor of Philadelphia, the city's Managing Director, the Police Commissioner, and two other police department supervisors, alleging a "pervasive pattern of illegal and unconstitutional mistreatment by police officers . . . directed against minority citizens in particular and against all Philadelphia residents in general."¹³ Specifically, the plaintiffs charged the supervisory officials with "conduct ranging from express authorization or encouragement of this mistreatment to failure to act in a manner so as to assure that it would not recur in the future."¹⁴ The lower courts found in favor of the plaintiffs and issued an injunction mandating that the parties de-

12. 423 U.S. 362 (1976).

13. *Id.* at 366-67.

14. *Id.* at 367.

velop "a comprehensive program for improving the handling of citizen complaints alleging police misconduct."¹⁵

The Supreme Court clearly disapproved of the injunction issued by the lower courts, but the precise reasoning underlying its decision is somewhat murky. The majority opinion mentioned a number of factors, only one of which touched on the question of supervisory liability.¹⁶ In the portion of the opinion relevant to supervisory liability, the Court noted that "there was no affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by [the supervisors]—express or otherwise—showing their authorization or approval of such misconduct."¹⁷ Although the Court did not disturb the district court's finding that at least some of the incidents cited in the plaintiffs' complaints involved constitutional misconduct on the part of individual police officers,¹⁸ it rejected the lower courts' conclusion that the supervisory defendants had therefore "fail[ed] to act in the face of a statistical pattern" of constitutional wrongdoing by their subordinates.¹⁹ Rather, the Court found that the factual findings made by the district court did not reveal a sufficient pattern of misconduct, and in fact that there had been "no showing that the behavior of the Philadelphia police was different in kind or degree from that which exists elsewhere."²⁰

15. *Id.* at 365 (quoting district court's order).

16. The other reasons for reversal mentioned in the Court's opinion were that the plaintiffs had not made the showing of likelihood of future injury required to obtain injunctive relief, *see id.* at 371-73; that the scope of the injunction issued by the district court impermissibly exceeded the scope of the constitutional violation, *see id.* at 377-78; and that the district court had "injected itself by injunctive decree into the internal disciplinary affairs of [a] state agency," thus violating "principles of equity, comity, and federalism." *Id.* at 379-80 (citation omitted).

17. *Id.* at 371.

18. In fact, as the Court noted, the parties had accepted the district court's findings of fact by the time the case reached the Court. *See id.* at 367.

19. *Id.* at 376 (emphasis omitted).

20. *Id.* at 375. Three years later, however, the Justice Department filed an "unprecedented" civil suit against the city of Philadelphia and 18 high-ranking city officials, alleging that they had condoned a systematic pattern of police brutality. Charles R. Babcock, *Justice Accuses Philadelphia of Police Abuses*, WASH. POST, Aug. 14, 1979, at A1. The suit was later dismissed on the grounds that neither the civil rights statutes nor the Constitution authorized the Federal Government to file a civil cause of action seeking to enjoin constitutional violations. *See United States v. Philadelphia*, 644 F.2d 187 (3d Cir. 1980). *But cf.* 42 U.S.C. § 14141 (1994) (statute passed in 1994 prohibits governmental authorities and their agents from "engag[ing] in a pattern or practice of conduct by law enforcement officers . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States" and authorizes the Attorney General to bring a civil action to "obtain appropriate equitable and declaratory relief to eliminate the pattern or practice").

Currently, the Justice Department is again considering investigating the Philadelphia police department. A number of its officers have been accused of manufacturing evidence, falsifying police reports, coercing confessions, and beating suspects, and six officers have already pleaded guilty. As a result of this misconduct, 137 convictions have been reversed and the city has paid seven million dollars in damages. *See Curriden, supra* note 10, at 63; *Wrongful Jailing to Cost Philadelphia \$1 Million*, N.Y. TIMES, Aug. 17, 1996, at A20.

Two years later, in *Monell v. Department of Social Services*,²¹ the Court addressed the scope of municipal liability in Section 1983 cases. *Monell*'s holding—that Section 1983 was not meant to make cities liable for the constitutional misdeeds of their employees on a respondeat superior basis,²² but only for violations that resulted from an official municipal policy or custom—is not directly applicable to suits against supervisors in their individual capacities.²³ But *Monell* observed that *Rizzo* “appear[ed]” to reject the argument that Section 1983 liability can be premised on “the mere right to control without any control or direction having been exercised and without any failure to supervise,”²⁴ and thereby signalled the Court’s unwillingness to impose respondeat superior liability on supervisors as well.

B. The Court of Appeals Cases

The courts of appeals have interpreted *Rizzo*'s requirement of an “affirmative link” between the supervisor and the constitutional misconduct of her subordinate as the touchstone for supervisory liability in Section 1983 cases.²⁵ In applying this standard, the lower courts now agree that the Supreme Court's opinions in *Monell* and *Rizzo* have rejected respondeat superior liability for supervisors as well as municipalities.²⁶ At the other extreme, the courts of appeals have refused to limit a supervisor's liability to the most egregious cases—those where she ordered or authorized the constitutional wrong, or was present and failed to prevent her subordinates from infringing the

21. 436 U.S. 658 (1978).

22. As defined in *Monell*, respondeat superior liability means holding a municipality liable “solely because it employs a tortfeasor”—that is, one who acted unconstitutionally. *Id.* at 691.

23. When a Section 1983 suit is brought against a state official in her individual, or personal, capacity, she is personally responsible for any damages awarded to the plaintiff. A Section 1983 suit filed against a state official in her official capacity is a suit against the office the defendant holds, and thus in essence a suit against her governmental employer. The employer must pay any damages awarded to the plaintiff, and the plaintiff must satisfy *Monell*'s official policy or custom requirement in order to prevail. See *Hafer v. Melo*, 502 U.S. 21, 25 (1991). See generally 1 SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983, at 488-90 (3d ed. 1991).

24. 436 U.S. at 694 n.58. For further discussion of *Monell*'s reasoning and its applicability to suits against supervisors, see *infra* notes 72-90 and accompanying text.

25. See, e.g., *Snell v. Tunnell*, 920 F.2d 673, 700 (10th Cir. 1990), *cert. denied*, 499 U.S. 976 (1991); *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 562 (1st Cir. 1989); *Gilmere v. City of Atlanta*, 774 F.2d 1495, 1504 (11th Cir. 1985) (en banc), *cert. denied*, 476 U.S. 1115 & 1124 (1986). But cf. Mark R. Brown, *Accountability in Government and Section 1983*, 25 U. MICH. J.L. REFORM 53, 77 (1991) (arguing that *Rizzo* does not define “the precise limits of supervisory liability” because it is in essence an “institutional case” that named the supervisors as defendants only because Section 1983 suits could not be brought against cities prior to *Monell*) (emphasis omitted).

26. See 1 NAHMOD, *supra* note 23, at 237. At one time, some courts were willing to impose respondeat superior liability on supervisors in Section 1983 cases, especially where the doctrine had been adopted by state law. See, e.g., *Scott v. Vandiver*, 476 F.2d 238, 242-43 (4th Cir. 1973). More recently, those cases have been abandoned. See, e.g., *Palmer v. Sanderson*, 9 F.3d 1433, 1437-38 (9th Cir. 1993); *Baskin v. Parker*, 602 F.2d 1205, 1207-08 (5th Cir. 1979).

plaintiff's rights.²⁷ In such cases, the supervisor has clearly "sub-jected" the plaintiff to a deprivation of rights, or "caused" her to be so subjected, and liability is thus easily proven. But the lower courts have also acknowledged that the requisite "affirmative link" can be shown where a supervisor does not order or witness the constitutional violation.

It is in these cases, however, that the courts have disagreed as to what level of culpability must be shown to justify imposing liability on a supervisor. In fact, some jurisdictions have not consistently applied the same standard of liability from case to case²⁸—or sometimes even in the same opinion.²⁹ In many cases, a supervisor is said to be responsible for the unconstitutional behavior of her subordinates if she acted recklessly or with deliberate indifference to the plaintiff's rights.³⁰ In other cases, the same courts have indicated that Section 1983 liability may be imposed on supervisors only if they knew of and acquiesced in the constitutional violation.³¹ Finally, a few courts have

27. See *Swint v. City of Wadley*, 51 F.3d 988, 999 (11th Cir. 1995); *Maldonado-Denis v. Castillo-Rodriguez*, 23 F.3d 576, 582 (1st Cir. 1994); *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 452 n.6 (5th Cir.) (en banc), *cert. denied*, 115 S. Ct. 70 (1994); *Larez v. City of Los Angeles*, 946 F.2d 630, 645 (9th Cir. 1991); *Snell*, 920 F.2d at 700.

28. See *infra* notes 29-32 (citing conflicting cases from the First, Third, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits).

29. See *Hegarty v. Somerset County*, 53 F.3d 1367, 1380 (1st Cir.) (indicating that supervisory liability rests on finding of "supervisory encouragement, condonation or acquiescence" or "gross negligence . . . amounting to deliberate indifference") (emphasis and citations omitted), *cert. denied*, 116 S. Ct. 675 (1995); *Larez*, 946 F.2d at 646 (noting that supervisors can be held liable for their "acquiescence in the constitutional deprivation" or for "conduct that showed 'a reckless or callous indifference to the rights of others'" (citations omitted). *But cf. Gutierrez-Rodriguez*, 882 F.2d at 562 (concluding that there is "no difference of moment" between a standard of "gross negligence amounting to deliberate indifference" and a standard of "reckless or callous indifference").

30. Language to this effect appears in opinions from the First, Third, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits. See, e.g., *Starzenski v. City of Elkhart*, 87 F.3d 872, 880 (7th Cir. 1996) ("knowingly, willfully, or at least recklessly cause[] the alleged deprivation"); *Hill v. Dekalb Reg'l Youth Detention Ctr.*, 40 F.3d 1176, 1192 (11th Cir. 1994) ("reckless or callous indifference"); *White v. Holmes*, 21 F.3d 277, 280 (8th Cir. 1994) ("deliberate indifference or tacit authorization"); *Taylor Indep. Sch. Dist.*, 15 F.3d at 453-54 ("deliberate indifference"); *Febus-Rodriguez v. Betancourt-Lebron*, 14 F.3d 87, 92 (1st Cir. 1994) ("reckless or callous indifference to the constitutional rights of others"); *Shaw v. Stroud*, 13 F.3d 791, 799 (4th Cir.) ("deliberate indifference to or tacit authorization of the alleged offensive practices"), *cert. denied*, 115 S. Ct. 67-68 (1994); *Gates v. Unified Sch. Dist. No. 449*, 996 F.2d 1035, 1041 (10th Cir. 1993) ("displayed deliberate indifference to or tacitly authorized the unconstitutional acts"); *Black by Black v. Indiana Area Sch. Dist.*, 985 F.2d 707, 712 (3d Cir. 1993) ("deliberate indifference"); *Larez*, 946 F.2d at 646 ("reckless or callous indifference").

31. Language to this effect appears in opinions from the Third, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits. See, e.g., *Gentry v. Duckworth*, 65 F.3d 555, 561 (7th Cir. 1995) ("knowledge and consent"); *Jojola v. Chavez*, 55 F.3d 488, 490 (10th Cir. 1995) ("actually knew of and acquiesced in [the subordinate's] behavior"); *Baker v. Monroe Township*, 50 F.3d 1186, 1194 (3d Cir. 1995) ("actual knowledge and acquiescence"); *Ripson v. Alles*, 21 F.3d 805, 809 (8th Cir. 1994) ("know[s] about the conduct and facilitate[s] it, approve[s] it, condone[s] it, or turn[s] a blind eye for fear of what [he] might see"); *Walton v. City of Southfield*, 995 F.2d 1331, 1340 (6th Cir. 1993) ("at least implicitly authorized, approved or knowingly acquiesced in the unconstitutional conduct"); *Sanders v. English*, 950 F.2d 1152, 1159-60 (5th Cir. 1992) ("[knew] about the conduct and facilitate[d] it, approve[d] it, condone[d] it, or turn[ed] a blind

suggested that gross negligence is the appropriate standard of liability.³² Although some older cases applied a simple negligence standard,³³ the courts now uniformly reject negligence as the standard of liability for supervisors in Section 1983 cases.³⁴

In addition to adopting differing standards of culpability, the lower courts have given conflicting signals as to whether they require proof of actual knowledge or are willing to impose liability in cases where the supervisor had constructive knowledge. Some cases have suggested that a supervisor may not be subjected to liability unless she was actually aware of her subordinate's constitutional misconduct.³⁵ Other cases have indicated that liability should be imposed when the supervisor was aware of a risk that her subordinate was acting in violation of the Constitution.³⁶ Still others require only proof that the

eye for fear of what [he] might see"); *Larez*, 946 F.2d at 646 ("acquiesce[d] in the constitutional deprivation").

32. The Second Circuit is the only jurisdiction that consistently applies this standard today. See *Black v. Coughlin*, 76 F.3d 72, 74 (2d Cir. 1996) ("gross negligence in managing subordinates"); *Wright v. Smith*, 21 F.3d 496, 501 (2d Cir. 1994) (same); cf. *Baker v. Putnal*, 75 F.3d 190, 199 (5th Cir. 1996) (supervisor's failure to train or supervise must "amount[] to gross negligence or deliberate indifference"); *Maldonado-Denis*, 23 F.3d at 582 (noting that "[g]ross negligence can signify deliberate indifference and serve as a basis for supervisory liability if it is causally connected to the actions that work the direct constitutional injury").

33. See *McKinnon v. City of Berwyn*, 750 F.2d 1383, 1391 (7th Cir. 1984); *Marchant v. City of Little Rock*, 741 F.2d 201, 204 (8th Cir. 1984); see also *Brown*, *supra* note 25, at 65-66 (noting that courts generally applied negligence standard in the 1970s).

34. See *Ripston*, 21 F.3d at 809; *Febus-Rodriguez*, 14 F.3d at 92-93; *Gates*, 996 F.2d at 1043; *Black*, 985 F.2d at 712-13; *Sanders*, 950 F.2d at 1159-60; *Greason v. Kemp*, 891 F.2d 829, 836 (11th Cir. 1990); *Jones v. City of Chicago*, 856 F.2d 985, 992 (7th Cir. 1988); *Haynesworth v. Miller*, 820 F.2d 1245, 1260-61 (D.C. Cir. 1987); see also cases cited *infra* note 242. Several commentators have, however, endorsed a negligence standard. See *Brown*, *supra* note 25, at 106-09; Note, *A Theory of Negligence for Constitutional Torts*, 92 YALE L.J. 683 (1983).

Admittedly, the difference between these various terms is somewhat "elusive." *Daniels v. Williams*, 474 U.S. 327, 334 (1986); see W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 34, at 210-14 (5th ed. 1984) (noting that ordinary negligence, gross negligence, and recklessness are different in degree, rather than kind). Nevertheless, as a general matter, knowledge and acquiescence is considered a higher standard than reckless or deliberate indifference, see, e.g., *Baker*, 50 F.3d at 1194 n.5, which in turn is regarded as a more culpable standard than gross negligence. See *City of Canton v. Harris*, 489 U.S. 378, 388 & n.7 (1989); *Taylor Indep. Sch. Dist.*, 15 F.3d at 453 n.7 (noting that deliberate indifference and gross negligence involve "different degrees of certainty . . . that negative consequences will result," and referring to gross negligence as a "heightened degree of negligence," whereas deliberate indifference is a "lesser form of intent"); *Gutierrez-Rodriguez*, 882 F.2d at 567. But cf. *Farmer v. Brennan*, 114 S. Ct. 1970, 1978-79 (1994) (equating recklessness and deliberate indifference, but noting that recklessness is "not self-defining," and in fact has been defined both subjectively—to require awareness of the risk of harm—and objectively—to impose liability where the risk was "so obvious that it should be known"); KEETON ET AL., *supra*, § 34, at 214 (noting that gross negligence and recklessness "have tended to merge and take on the same meaning").

35. See *Jojola*, 55 F.3d at 490; *Baker*, 50 F.3d at 1194 & n.5; *Woodward v. City of Worland*, 977 F.2d 1392, 1399 (10th Cir. 1992), *cert. denied*, 509 U.S. 923 (1993); *Sanders v. Brewer*, 972 F.2d 920, 923 (8th Cir. 1992); *Manarite by Manarite v. City of Springfield*, 957 F.2d 953, 956 (1st Cir.) (requiring actual knowledge or at least willful blindness), *cert. denied*, 506 U.S. 837 (1992). This standard corresponds to the mens rea of knowledge in criminal law. See MODEL PENAL CODE § 2.02(2)(b) (Official Draft 1985).

36. See, e.g., *Hall v. Lombardi*, 996 F.2d 954, 961 (8th Cir. 1993) (rejecting requirement of actual knowledge, and instead indicating that reckless disregard will suffice), *cert. denied*, 510

supervisor should have been aware of the constitutional wrong.³⁷ The position a court takes on this question does not necessarily turn on the standard of liability it has chosen,³⁸ and in fact, the courts are not necessarily consistent from case to case³⁹—or even within the same opinion⁴⁰—on this issue.

II. JUSTIFYING THE VARYING STANDARDS OF SUPERVISORY LIABILITY

Although the courts of appeals have not been consistent in choosing a standard of liability for supervisors in Section 1983 cases, they have been consistent in failing to provide much in the way of justification for whichever standard they have adopted. Admittedly, Congress and the Supreme Court have not given the lower courts much guidance on this issue. Neither the text nor the legislative history of Section 1983 suggests that Congress intended to impose a particular standard of liability on supervisors, and the Supreme Court has addressed the question directly only by holding that some level of culpability is required.⁴¹ Although the courts of appeals have relied on Supreme Court precedents that discuss other aspects of Section 1983 litigation, those cases make for poor doctrinal analogies.

U.S. 1047 (1994); *Gates*, 996 F.2d at 1041-42 n.1 (requiring at least "conscious acceptance of a known risk"). This standard corresponds to the criminal law's mens rea of recklessness. See MODEL PENAL CODE § 2.02(2)(c) (Official Draft 1985).

37. See *Wright*, 21 F.3d at 501; *Febus-Rodriguez*, 14 F.3d at 92-93; *Shaw v. Stroud*, 13 F.3d 791, 799 (4th Cir.), cert. denied, 115 S. Ct. 67-68 (1994); *Hall*, 996 F.2d at 961-62; *Larez*, 946 F.2d at 646. This standard corresponds to the mens rea of negligence in criminal law. See MODEL PENAL CODE § 2.02(2)(d) (Official Draft 1985).

38. Of the cases cited in note 35 *supra* that require proof of actual knowledge, *Jojola* and *Baker* were applying a standard of knowledge and acquiescence; *Sanders* and *Manarite* were applying a standard of deliberate indifference; and the opinion in *Woodward* contains language incorporating both standards. See *Jojola*, 55 F.3d at 490; *Baker*, 50 F.3d at 1194; *Woodward*, 977 F.2d at 1399-1400; *Sanders*, 972 F.2d at 923; *Manarite*, 957 F.2d at 957.

Of the cases cited in note 36 *supra* that require awareness of a risk of constitutional injury, the courts in both *Hall* and *Gates* were applying a standard of recklessness or deliberate indifference. See *Hall*, 996 F.2d at 961; *Gates*, 996 F.2d at 1041.

Of the cases cited in note 37 *supra* that impose liability in cases of constructive knowledge, the courts in *Febus-Rodriguez*, *Shaw*, and *Hall* were applying a standard of reckless or deliberate indifference; the court in *Wright* was applying a standard of gross negligence; and the opinion in *Larez* contains language consistent with both the deliberate indifference and the knowledge and acquiescence standards. See *Wright*, 21 F.3d at 501; *Febus-Rodriguez*, 14 F.3d at 92; *Shaw*, 13 F.3d at 799; *Hall*, 996 F.2d at 961; *Larez*, 946 F.2d at 646.

39. See *supra* notes 35-37 (citing conflicting cases from the First, Eighth, and Tenth Circuits).

40. In *Jojola*, for example, the Tenth Circuit declared that proof of actual knowledge was required but, in the next breath, rejected the plaintiffs' claim of constructive knowledge on the merits. See *Jojola*, 55 F.3d at 490-91. Likewise, in *Hall*, the Eighth Circuit indicated that proof of reckless disregard suffices but then suggested that the question for the jury was whether the supervisors knew or should have known about the constitutional violation. See *Hall*, 996 F.2d at 961-62.

41. See *supra* notes 16-24 and accompanying text.

A. *The Language and Legislative History of Section 1983*

Section 1983 is a very terse statute,⁴² and nothing in its language speaks directly to the standard of liability that ought to be imposed in cases involving supervisory officials. By providing that a state official is liable whenever she “subjects” another person to a deprivation of rights or “causes” her to be so subjected, the statute suggests that plaintiffs must demonstrate some culpable act on the part of each defendant, as well as a causal link between that act and the constitutional violation.⁴³ Beyond that, the statutory language does not point to a particular point on the continuum of potential liability standards—ranging from the relatively low threshold of culpability that imposes liability for negligent conduct to the very high threshold that demands proof of a malicious purpose to cause constitutional injury.

Nothing in the provision’s sparse legislative history sheds further light on the question of supervisory liability. The bill that included Section 1983 was passed hurriedly, and, as with many of the issues that arise in Section 1983 litigation, Congress provided no guidance on the intended scope of the provision.⁴⁴ Thus, here, as elsewhere, Congress delegated to the federal courts the task of developing the law.⁴⁵

B. *Supreme Court Precedent*

Some courts of appeals have relied on Supreme Court precedent to justify the standard of liability they have chosen to impose on supervisors in Section 1983 cases, even though none of the Supreme Court’s opinions are controlling—or even particularly persuasive—on this issue.

42. See *supra* note 5.

43. For further discussion of the causation requirement in Section 1983 cases and its application to claims against supervisors, see *infra* notes 103, 176-90 and accompanying text.

44. See *Monell v. Department of Social Servs.*, 436 U.S. 658, 665 (1978) (noting that the bill containing Section 1983 was passed by both the House and Senate within three weeks of its introduction in the House and that Section 1983 was “the subject of only limited debate”); *Monroe v. Pape*, 365 U.S. 167, 172-74 (1961) (observing that Section 1983 was passed less than one month after President Grant sent a message to Congress requesting legislation).

45. See generally Theodore Eisenberg, *State Law in Federal Civil Rights Cases: The Proper Scope of Section 1983*, 128 U. PA. L. REV. 499, 509-10 (1980) (noting that “section 1983 does not address a host of . . . issues,” including damages, affirmative defenses, immunities, statutes of limitations, and survival of actions); Seth F. Kreimer, *The Source of Law in Civil Rights Actions: Some Old Light on Section 1983*, 133 U. PA. L. REV. 601, 603 (1985) (describing Section 1983 as “[l]aconically drafted” and “a blank canvas upon which the federal courts must sketch the details of a cause of action”); Harold S. Lewis, Jr. & Theodore Y. Blumoff, *Reshaping Section 1983’s Asymmetry*, 140 U. PA. L. REV. 755, 760 (1992) (referring to Section 1983 as “almost entirely a judicial construct”); cf. William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1488 (1987) (noting that the language of Section 1983 “gives the Court a great deal of freedom in interpreting it” and that “the statute’s interpretation and the needs and values of society have changed substantially” since its enactment, and therefore concluding that “the historical perspective [is] less persuasive” and the statute ought to be interpreted dynamically).

The Court's opinion in *Rizzo v. Goode* requires an "affirmative link" between the supervisor and the constitutional violation,⁴⁶ and dictum in *Monell v. Department of Social Services* describes *Rizzo* as rejecting a standard of strict vicarious liability for supervisors and instead requiring evidence of a "failure to supervise."⁴⁷ But the Court has given no more specific guidelines as to precisely what constitutes an "affirmative link," or how egregious a "failure to supervise" is required to make out a case against a supervisor. Any level of culpability ranging from negligence to deliberate intent would appear faithful to the language in these opinions.

Nevertheless, some courts of appeals have relied on Supreme Court precedent that is not directly on point, but that they view as analogous—most notably, cases discussing the state-of-mind requirements for various constitutional violations⁴⁸ and cases addressing municipal liability in Section 1983 suits.⁴⁹ As explained below, reliance on these opinions is misplaced.

1. *The State-of-Mind Cases*

A Section 1983 plaintiff must, of course, establish that a state official violated her constitutional rights, and proof of the constitutional violation may require evidence that the state official acted with a particular state of mind.⁵⁰ In choosing a standard of supervisory liability, some courts of appeals have relied on Supreme Court opinions that address the state of mind necessary to make out a violation of particular constitutional rights.

In *Daniels v. Williams*⁵¹ and *Davidson v. Cannon*,⁵² for example, the Supreme Court held that a due process violation requires proof of a state of mind more culpable than negligence. Some courts of appeals have cited those opinions in rejecting negligence as the standard of supervisory liability. Thus, for instance, the Tenth Circuit reasoned in *Jojoba v. Chavez*⁵³ that, because "[l]iability under § 1983 must be predicated upon a 'deliberate' deprivation of constitutional rights by the defendant," and not on negligence, . . . [t]herefore, to impose personal liability on [supervisory officials], plaintiffs must allege, and

46. 423 U.S. 362, 371 (1976); see *supra* note 17 and accompanying text.

47. 436 U.S. 658, 694 n.58 (1978); see *supra* note 24 and accompanying text.

48. See *infra* notes 50-71 and accompanying text.

49. See *infra* notes 72-113 and accompanying text.

50. See *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976) (requiring proof of deliberate indifference to prove violation of the Eighth Amendment); *Washington v. Davis*, 426 U.S. 229, 239-40 (1976) (requiring proof of an intent to discriminate in order to prove violation of the Equal Protection Clause).

51. 474 U.S. 327 (1986).

52. 474 U.S. 344 (1986).

53. 55 F.3d 488 (10th Cir. 1995).

prove, [that the supervisors] actually knew of and acquiesced in“ the constitutional violation.⁵⁴

In *Daniels* and *Davidson*, the Supreme Court overruled its earlier decision in *Parratt v. Taylor*,⁵⁵ which had held that a negligent taking of property “amounted to a deprivation”⁵⁶ of due process within the meaning of the Due Process Clause.⁵⁷ In overruling *Parratt*, the Court held in *Daniels* and *Davidson* that “the word ‘deprive’ in the Due Process Clause connote[s] more than a negligent act,” and therefore “the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property.”⁵⁸ Though holding that the *Due Process Clause* requires proof of a state of mind more culpable than negligence, the Court did not suggest that *Section 1983* likewise demands proof that the state official acted with a culpability greater than negligence. In fact, the Court did not retreat from the other holding in *Parratt*—that *Section 1983* contains no independent state-of-mind requirement,⁵⁹ so that the plaintiff’s only burden is to prove that the defendant acted with the state of mind required to violate the particular constitutional provision at issue.⁶⁰ And the Court expressly refused to “rule out the possibility that there are other constitutional provisions that would be violated by mere lack of care.”⁶¹

54. *Id.* at 490 (emphasis omitted) (quoting *Woodward v. City of Worland*, 977 F.2d 1392, 1399 (10th Cir. 1992), *cert. denied*, 509 U.S. 923 (1993) (which relied, in turn, on *Daniels* and *Davidson*)); *see also* *Jones v. City of Chicago*, 856 F.2d 985, 992 (7th Cir. 1988).

55. 451 U.S. 527 (1981).

56. *Id.* at 536-37.

57. The Due Process Clause prohibits the states from “depriv[ing] any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1.

58. *Daniels*, 474 U.S. at 330, 328. Although the Court observed that “[h]istorically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property,” *id.* at 331, the Court expressly declined to decide precisely what state of mind was required to make out a claim under the Due Process Clause. *See id.* at 334 n.3 (“[T]his case affords us no occasion to consider whether something less than intentional conduct, such as recklessness or ‘gross negligence,’ is enough to trigger the protections of the Due Process Clause.”).

59. *See Parratt*, 451 U.S. at 535.

60. *Daniels*, 474 U.S. at 328.

61. *Id.* at 334; *see also Parratt*, 451 U.S. at 534 (noting that “[n]othing in the language of § 1983 or its legislative history limits the statute solely to intentional deprivations of constitutional rights,” and that the Court’s earlier opinion in *Baker v. McCollan*, 443 U.S. 137 (1979), “suggested that simply because a wrong was negligently as opposed to intentionally committed did not foreclose the possibility that such action could be brought under § 1983”); *Baker*, 443 U.S. at 139-40 (“[T]he question whether an allegation of simple negligence is sufficient to state a cause of action under § 1983 is more elusive than it appears at first blush. It may well not be susceptible of a uniform answer across the entire spectrum of conceivable constitutional violations . . .”); *cf. Graham v. Connor*, 490 U.S. 386, 397 (1989) (holding that all *Section 1983* claims alleging that the police used an excessive amount of force in arresting, stopping, or seizing a suspect are to be analyzed under the Fourth Amendment, which inquires whether “the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation”).

Moreover, the Court’s justifications for interpreting the Due Process Clause to require more than negligence—to protect against the “trivializ[ation]” of the Clause, to limit its application to cases involving an “abuse of power,” and to ensure that the Constitution does not “supplant

Likewise, courts of appeals in other supervisory liability cases have mistakenly relied on the Supreme Court's substantive interpretation of the Eighth Amendment in *Farmer v. Brennan*⁶² to support an unnecessarily generous standard of supervisory liability. *Farmer* adopted a "subjective" definition of the "deliberate indifference" needed to make out a violation of the Eighth Amendment's ban on cruel and unusual punishment, holding that "a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he *knows* that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it."⁶³ In choosing this "subjective" definition of deliberate indifference, the Court rejected the so-called objective approach, which imposes liability on one who "acts . . . in the face of an unjustifiably high risk of harm that is either known *or* so obvious that it should be known."⁶⁴ Following this lead, the Eighth Circuit rejected the plaintiff's argument in *Boyd v. Knox*⁶⁵ that a supervisor can be held liable if she either knew or should have known about her subordinate's misconduct, reasoning simply that "[t]his argument is expressly foreclosed by *Farmer v. Brennan*."⁶⁶

But the Court in *Farmer* was careful to point out that it was not issuing an abstract definition of the term "deliberate indifference" for all purposes. Rather, the Court made clear, the definition of deliberate indifference adopted in *Farmer* was "based on the Constitution and our [Eighth Amendment] cases, not merely on a parsing of the phrase 'deliberate indifference.'"⁶⁷ And the Court acknowledged that it had adopted a more objective definition of deliberate indifference in *City of Canton v. Harris*,⁶⁸ an earlier opinion discussing the scope of a city's Section 1983 liability for constitutional violations—in that case, an alleged violation of the Due Process Clause.⁶⁹ But the *Farmer*

traditional tort law"—are irrelevant in cases where the plaintiff has clearly suffered a constitutional injury, and the question is whether to hold a supervisor accountable for her subordinate's nontrivial abuse of power. *Daniels*, 474 U.S. at 332.

62. 114 S. Ct. 1970 (1994).

63. *Id.* at 1984 (emphasis added).

64. *Id.* at 1978 (emphasis added). For the view that the Court's ruling is "misguided," "unjust and unworkable," and "effectively leaves inhumane prison conditions without constitutional remedy," see *The Supreme Court, 1993 Term—Leading Cases*, 108 HARV. L. REV. 139, 240, 239, 235 (1994) (advocating that the subjective definition should be applied only in prison cases involving isolated events).

65. 47 F.3d 966 (8th Cir. 1995).

66. *Id.* at 968 n.1. Although *Boyd* is an Eighth Amendment case, the language quoted in the text seems to be part of the court's general discussion of supervisory liability in Section 1983 cases.

67. 114 S. Ct. at 1980.

68. 489 U.S. 378 (1989).

69. See *id.* at 385-92. In *Canton*, the Court held that a city can be held liable under Section 1983 for a constitutional violation that results from its failure to train its employees so long as the city was "deliberately indifferent" to the rights of its inhabitants. In so ruling, the Court noted: [I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the

Court rejected the plaintiff's reliance on *Canton*'s more objective standard:

Canton's objective standard . . . is not an appropriate test for determining the liability of prison officials under the Eighth Amendment as interpreted in our cases. Section 1983, which merely provides a cause of action, "contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right" [quoting *Daniels v. Williams*]. And while deliberate indifference serves under the Eighth Amendment to ensure that only inflictions of punishment carry liability, the "term was used in the *Canton* case for the quite different purpose of identifying the threshold for holding a city responsible for the constitutional torts committed by its inadequately trained agents," a purpose the *Canton* Court found satisfied by a test permitting liability when a municipality disregards "obvious" needs.⁷⁰

Thus, as *Farmer* makes clear, it is wrong for the lower courts to choose a standard of supervisory liability for all Section 1983 cases by blindly following the Supreme Court opinions analyzing the state of mind necessary to make out a violation of a particular constitutional provision. To do so is to confuse two independent elements of a Section 1983 cause of action: proof of a constitutional violation, with its attendant state-of-mind inquiry, and the appropriate standard of supervisory liability.⁷¹

violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.

Id. at 390. For further discussion of *Canton* and its applicability to suits involving supervisors, see *infra* notes 91-113 and accompanying text.

70. 114 S. Ct. at 1981 (citations omitted).

71. One commentator has suggested a variation on this theme—that supervisors should be held liable in Section 1983 cases only if they had whatever state of mind is necessary to make out a violation of the constitutional right on which the plaintiff's suit is based. See Sheldon H. Nahmod, *Constitutional Accountability in Section 1983 Litigation*, 68 IOWA L. REV. 1, 18-22 (1982). Unlike the court of appeals opinions criticized in text, this proposal does not advocate that a particular mens rea be required across the board for all supervisory liability cases, but instead that the state of mind required in any given case track the state of mind required for the specific constitutional provision at issue. Under Professor Nahmod's proposal, therefore, not only the subordinate directly responsible for violating the plaintiff's rights, but also the supervisor, would have to have the mens rea necessary to prove that particular constitutional violation.

Although Nahmod's approach is not guilty of conflating the state-of-mind inquiry with the standard of supervisory liability in the same way as the court of appeals opinions discussed in text, he would add a requirement to the plaintiff's case that is not contemplated by the language of Section 1983. The statute merely requires that the plaintiff suffered a constitutional injury—thus requiring proof that the subordinate acted with the requisite mens rea—and that the supervisor "caused" the plaintiff to be subjected to that violation. Moreover, Nahmod would, in essence, require the plaintiff to prove that the supervisor herself violated the Constitution, thus mooted the very question of a supervisor's accountability for the constitutional wrongs of her subordinates.

2. *The Municipal Liability Cases*

In other supervisory liability cases, the courts of appeals have borrowed—typically, with little analysis or explanation—the standards for municipal liability that the Court has adopted for Section 1983 cases. As noted above, the Court's opinion in *Monell v. Department of Social Services* held that a city may be subjected to liability under Section 1983 only if the plaintiff's constitutional injury resulted from an official municipal policy or custom.⁷² Apparently relying on this holding, the Fourth Circuit noted in *Strickler v. Waters*⁷³ that "[b]ecause [the supervisor] cannot be held vicariously liable for any conduct of his subordinates, [the plaintiff] must show 'that the conduct directly causing the deprivation was done to effectuate an official policy or custom for which [the supervisor] was responsible.'"⁷⁴ Likewise, in *Schmelz v. Monroe County*,⁷⁵ the Eleventh Circuit affirmed the trial court's order granting summary judgment to a supervisory official on the grounds that "there existed no evidence that [he] promulgated an unconstitutional policy or custom that led to [the plaintiff's] injuries."⁷⁶

Monell's rationale for rejecting respondeat superior liability for cities and instead requiring proof of an official municipal policy or custom does not apply to the quite distinct issue of supervisory liability.⁷⁷ To be sure, as noted above, dictum in the Court's opinion in *Monell* suggests that vicarious liability should not be applied to super-

72. 436 U.S. 658, 690-95 (1978); see *supra* notes 22-23 and accompanying text. The plaintiffs in *Monell* were a group of female employees who sued to challenge a city policy that required pregnant women to take maternity leave before medically necessary, a practice that the Supreme Court had previously struck down in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974).

73. 989 F.2d 1375 (4th Cir.), *cert. denied*, 510 U.S. 949 (1993).

74. *Id.* at 1387 (citation omitted).

75. 954 F.2d 1540 (11th Cir. 1992).

76. *Id.* at 1544; see also *Mackinney v. Nielsen*, 69 F.3d 1002, 1008 (9th Cir. 1995) (rejecting claims against chief of police because "we are hard pressed to find any evidence of a policy that 'repudiates' constitutional rights"); *Hill v. Dekalb Reg'l Youth Detention Ctr.*, 40 F.3d 1176, 1194 (11th Cir. 1994) (rejecting claim against individual defendant on grounds that he did not have final policy-making authority); *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 725-26 (3d Cir. 1989) (requiring proof that supervisor had a policy or custom of deliberate indifference to subordinates' constitutional wrongs), *cert. denied*, 493 U.S. 1044 (1990); cf. *Larson v. Larson*, 76 F.3d 1446, 1453 (8th Cir. 1996) (en banc) (using virtually identical language in describing standard of liability for supervisors and school district); *Wilson v. City of Chicago*, 6 F.3d 1233, 1240-41 (7th Cir. 1993) (using reasoning to reject Section 1983 claim against city that is indistinguishable from reasoning that would be used to analyze claim against supervisor), *modified on other grounds*, Nos. 89-3747 & 90-2216, 1993 U.S. App. LEXIS 31896 (7th Cir. Dec. 8, 1993), *cert. denied*, 114 S. Ct. 1844 (1994); *Lipsett v. University of P.R.*, 864 F.2d 881, 902 (1st Cir. 1988) (using same standard of liability for supervisors sued in official and individual capacity).

77. As explained in note 23, *supra*, the special requirements for Section 1983 suits involving municipalities do apply to claims filed against city officials—including supervisors—in their official capacities, but not to those filed against city officials in their individual or personal capacities. The cases described in this section fall into the latter category.

visors,⁷⁸ but Section 1983's requirement of a causal link between the supervisor and the plaintiff's constitutional injury⁷⁹ itself is sufficient reason to require some culpability on the part of the supervisor.⁸⁰ Beyond that, neither the text of the statute nor *Monell's* rejection of vicarious liability for cities sheds any light on the standard of culpability that ought to apply to supervisors.

In declining to impose vicarious liability on cities, *Monell* relied on both the causation language in Section 1983⁸¹ and the portion of the legislative debates in which Congress rejected an amendment to *another section* of the bill, not to Section 1983. That amendment, the so-called Sherman amendment, would have made a municipality liable for "damage done to the person or property of its inhabitants by *private* persons 'riotously and tumultuously assembled.'"⁸² The *Monell* Court acknowledged that, "[s]trictly speaking, . . . the fact that Congress refused to impose vicarious liability for the wrongs of a few private citizens does not conclusively establish that it would similarly have refused to impose vicarious liability for the torts of a municipality's employees."⁸³ Nevertheless, mindful of Congress's concerns about the constitutionality of imposing obligations on municipalities,⁸⁴ the Court concluded that "when Congress' rejection of the only form of vicarious liability presented to it is combined with the absence of any language in § 1983 which can easily be construed to create respondeat superior liability, the inference that Congress did not intend to impose such liability is quite strong."⁸⁵

The most that can be read into this legislative history is a rejection of the strict liability associated with the doctrine of respondeat

78. See *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 694 n.58 (1978); see *supra* note 24 and accompanying text.

79. See *supra* note 5.

80. For further discussion of Section 1983's causation requirement and its application to supervisory liability, see *infra* notes 103, 176-90 and accompanying text.

81. See *Monell*, 436 U.S. at 691-92.

82. *Id.* at 664 (quoting CONG. GLOBE, 42d Cong., 1st Sess. 749 (1871)).

An earlier version of the Sherman amendment, which was likewise rejected, would have made any inhabitant of a city liable for such damage. See *id.* at 666. Because that amendment imposed liability on private citizens rather than governmental entities or officials, it is even less relevant to the question of supervisory liability in Section 1983 cases.

A version of the Sherman amendment was ultimately adopted as 42 U.S.C. § 1986 (1994), but it likewise has nothing to do with the type of supervisory liability at issue here. Rather, it imposes civil liability on one who is aware that a civil rights conspiracy is about to be committed and has the power to prevent the conspiracy but fails to do so. That provision is linked to the cause of action created by 42 U.S.C. § 1985(3) (1994) against those who conspire to violate civil rights, and not to Section 1983. See *Monell*, 436 U.S. at 668-69.

83. 436 U.S. at 693 n.57.

84. See *id.* at 693.

85. *Id.* at 693 n.57. The Court likewise dismissed two common policy justifications for respondeat superior liability—that "accidents might . . . be reduced if employers had to bear the cost" and that "the cost of accidents should be spread to the community as a whole on an insurance theory"—on the ground that both arguments had been advanced by proponents of the Sherman amendment and obviously found insufficiently persuasive to a majority of Congress. *Id.* at 693-94.

superior; the legislative history says nothing affirmative about what level of culpability Congress intended to impose on supervisors. The *Monell* Court may have been right to equate Congress's rejection of vicarious liability for cities with the official policy or custom requirement.⁸⁶ After all, municipalities cannot act independently of their employees, they have no state of mind independent of their employees, and it may seem unfair to saddle innocent taxpayers with the costs of injuries inflicted by city employees acting on their own initiative.⁸⁷ But the same cannot be said for supervisory officials: they can act independently of their subordinates and with a different state of mind, and there is no inequity in asking a supervisor to compensate someone who was injured as a result of her failure to properly supervise her subordinates. The supervisor cannot be considered "innocent," and, as the *Monell* Court itself acknowledged, the Congress that enacted Section 1983 had no qualms about the constitutionality of imposing liability on individual state or city officials.⁸⁸ Moreover, supervisory officials have a qualified immunity defense that absolves them from damages liability unless the constitutional violation alleged by the plaintiff was clearly established. That defense is not available to protect municipalities,⁸⁹ but it does ensure that damages will not be assessed against blameless supervisors.⁹⁰ Accordingly, there is no justification for importing *Monell's* official policy and custom requirement into supervisory liability cases.

In a more recent municipal liability case, *City of Canton v. Harris*,⁹¹ the Supreme Court held that Section 1983 liability can be imposed on a city that fails to adequately train the employees who violate a plaintiff's constitutional rights, but only if "the failure to train amounts to deliberate indifference to the rights of persons with whom the [employees] come into contact."⁹² Some courts of appeals have

86. This point has not, however, been uncontroversial. For criticism of the Court's ruling in *Monell*, see *City of Okla. City v. Tuttle*, 471 U.S. 808, 841-42 (1985) (Stevens, J., dissenting); Larry Kramer & Alan O. Sykes, *Municipal Liability Under § 1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249, 255-61; Lewis & Blumoff, *supra* note 45, at 787; Susanah M. Mead, 42 U.S.C. § 1983 Municipal Liability: The *Monell* Sketch Becomes a Distorted Picture, 65 N.C. L. REV. 517, 532-46 (1986); Christina B. Whitman, *Government Responsibility for Constitutional Torts*, 85 MICH. L. REV. 225, 235-38 (1986); Charles A. Rothfeld, Comment, *Section 1983 Municipal Liability and the Doctrine of Respondeat Superior*, 46 U. CHI. L. REV. 935 (1978).

87. Cf. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 265-67 (1981) (making this argument in context of holding that punitive damages may not be assessed against municipal defendants in Section 1983 cases).

88. See 436 U.S. at 682.

89. See *Owen v. City of Independence*, 445 U.S. 622 (1980) (holding that cities may not avail themselves of the good faith defense available to executive branch officials in Section 1983 cases).

90. For further discussion of the qualified immunity defense, see *infra* notes 245-53 and accompanying text.

91. 489 U.S. 378 (1989).

92. *Id.* at 388. The plaintiff in *City of Canton* alleged a violation of her due process right to receive necessary medical care while in police custody. She attempted to implicate the city in that violation by arguing that it had failed to adequately train police department employees

relied on this holding to likewise absolve supervisors from liability absent a showing of deliberate indifference on their part. In *Doe v. Taylor Independent School District*,⁹³ for example, the Fifth Circuit explained:

A municipality, with its broad obligation to supervise all of its employees, is liable under § 1983 if it supervises its employees in a manner that manifests deliberate indifference to the constitutional rights of citizens. We see no principled reason why an individual to whom the municipality has delegated responsibility to directly supervise the employee should not be held liable under the same standard.⁹⁴

Likewise, in *Greason v. Kemp*,⁹⁵ the Eleventh Circuit decided to borrow *City of Canton*'s deliberate indifference standard for supervisory liability cases, reasoning that "[b]ecause a supervisor's orders and directions are tantamount to official policy in the eyes of a subordinate, we find the analogous situation of municipal liability under *City of Canton* to be helpful."⁹⁶

This reliance is misplaced: the Court's reasoning in *City of Canton v. Harris* is premised in large part on *Monell*'s official policy or custom requirement, a requirement that is limited to suits against cities and has no applicability to suits against supervisory officials in their personal capacity.⁹⁷ Specifically, the Court explained in *City of Canton*:

Only where a municipality's failure to train its employees in a relevant respect evidences a "deliberate indifference" to the rights of its inhabitants can such a shortcoming be properly thought of as a city "policy or custom" that is actionable under § 1983. As Justice Brennan's opinion in *Pembaur v. Cincinnati* put it: "[M]unicipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives" by city policymakers.

responsible for determining when to seek medical treatment for detainees. In holding that inadequate training programs can subject a city to Section 1983 liability, the Court rejected the contention that municipal liability is limited to cases involving city policies that are unconstitutional on their face. See *id.* at 386-87.

93. 15 F.3d 443, 453 (5th Cir.) (en banc), *cert. denied*, 115 S. Ct. 70 (1994).

94. *Id.*

95. 891 F.2d 829 (11th Cir. 1990).

96. *Id.* at 837. For similar cases, see *Tilson v. Forrest City Police Dep't*, 28 F.3d 802, 807 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1315 (1995); *Woodward v. City of Worland*, 977 F.2d 1392, 1399-1400 (10th Cir. 1992), *cert. denied*, 509 U.S. 923 (1993); *Schmelz v. Monroe County*, 954 F.2d 1540, 1544 (11th Cir. 1992); *Walker v. Norris*, 917 F.2d 1449, 1455 (6th Cir. 1990); *Wilks v. Young*, 897 F.2d 896, 898 (7th Cir. 1990); *Sample v. Diecks*, 885 F.2d 1099, 1117-18 (3d Cir. 1989) ("[W]e are confident that . . . the standard of individual liability for supervisory public officials will be found to be no less stringent than the standard of liability for the public entities that they serve."). See also 1 MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS, DEFENSES, AND FEES § 7.11, at 386 (2d ed. 1991).

97. For a discussion of the distinction between personal capacity and official capacity suits, see *supra* note 23.

Only where a failure to train reflects a "deliberate" or "conscious" choice by a municipality—a "policy" as defined by our prior cases—can a city be liable for such a failure under § 1983.⁹⁸

Some courts of appeals have also pointed to the language in *City of Canton* referring to Section 1983's causation requirement to justify applying the *Canton* ruling to cases involving supervisors.⁹⁹ The Court's opinion in *City of Canton* made two references to the subject of causation. It said, first, that because *Monell* had held that

a municipality can be found liable under § 1983 only where the municipality *itself* causes the constitutional violation at issue, . . . our first inquiry in any case alleging municipal liability under § 1983 is the question whether there is a direct causal link between a municipal policy or custom and the alleged constitutional deprivation.¹⁰⁰

Second, the *Canton* Court noted that "a municipality can be liable under § 1983 only where its policies are the 'moving force [behind] the constitutional violation.'"¹⁰¹ Although Section 1983 requires generally that each defendant either "subject[ed]" the plaintiff to a deprivation of constitutional rights or "cause[d] [her] to be subjected" to such a deprivation,¹⁰² both references to the causation requirement in *City of Canton* focus on the requisite causal link between the constitutional violation and the municipality's official policy or custom, again a requirement that has no bearing on suits against supervisors in their individual capacity. Moreover, as others have persuasively argued,¹⁰³ even a negligent act on the part of a municipality (or supervisor) can cause a constitutional violation and thus satisfy Section 1983's causation requirement.

Admittedly, two aspects of the Court's reasoning in *City of Canton* might be applicable to Section 1983 suits against supervisors. First, the Court noted that a standard of culpability lower than deliberate indifference "would result in de facto respondeat superior liability on municipalities" because "[i]n virtually every instance where a person has had his or her constitutional rights violated by a city employee, a § 1983 plaintiff will be able to point to something the city

98. *City of Canton v. Harris*, 489 U.S. 378, 389 (1989) (citations omitted).

99. See, e.g., *Taylor Indep. Sch. Dist.*, 15 F.3d at 453.

100. 489 U.S. at 385.

101. *Id.* at 389.

102. See *supra* note 5.

103. See Barbara Kritchevsky, "Or Causes to be Subjected": *The Role of Causation in Section 1983 Municipal Liability Analysis*, 35 UCLA L. REV. 1187, 1250-55 (1988); Lewis & Blumoff, *supra* note 45, at 788; Peter H. Schuck, *Municipal Liability Under Section 1983: Some Lessons from Tort Law and Organization Theory*, 77 GEO. L.J. 1753, 1764-66 (1989); Ruth Friedman, Note, *Municipal Liability for Police Misconduct: Must Victims Now Prove Intent?*, 97 YALE L.J. 448, 457-59 (1988). For further discussion of the causation requirement and its application in suits involving supervisors, see *infra* notes 176-90 and accompanying text.

'could have done' to prevent the unfortunate incident."¹⁰⁴ Although the Court may be right that imposing Section 1983 liability in every case where the defendant "could have done" something to prevent the constitutional injury amounts to respondeat superior liability—a result prohibited as to cities by *Monell* and as to supervisory officials by *Rizzo*—it is flat out wrong to suggest that only a requirement of deliberate indifference will prevent that result. A finding of even negligence cannot be based simply on the fact that the defendant "could have done" something to prevent the plaintiff's injury,¹⁰⁵ and adopting a lesser standard of culpability, when coupled with Section 1983's causation requirement, would therefore avoid the respondeat superior liability that the Court rejected in *Rizzo* and *Monell*.

The second element of the Court's opinion in *City of Canton* that might arguably apply to supervisors is its observation that "a lesser standard of fault would . . . engage the federal courts in an endless exercise of second-guessing municipal employee-training programs . . . [,] an exercise we believe the federal courts are ill suited to undertake [and] one that would implicate serious questions of federalism."¹⁰⁶ Although this objection seems more properly directed at Section 1983 claims filed against governmental entities than at those filed against individual defendants, the *Canton* Court cited *Rizzo* in support of its federalism argument,¹⁰⁷ and one might argue that the same "second-guessing" the Court was concerned about in *City of Canton* might occur in a suit alleging that a supervisor created or implemented an inadequate training program.

Nevertheless, there are several problems with relying on this dictum in cases involving supervisors. First, *Rizzo*'s federalism concerns were directed only at injunctive suits, which involve a "'continuing intrusion'" on the part of the federal courts into the operations of a state agency, and not at damages suits.¹⁰⁸ Second, *Rizzo* admitted

104. *City of Canton*, 489 U.S. at 392; see *Taylor Indep. Sch. Dist.*, 15 F.3d at 453 (relying on this argument); *Greason v. Kemp*, 891 F.2d 829, 836 (11th Cir. 1990) (same).

105. See RESTATEMENT (SECOND) OF TORTS § 291 cmt. f (1965) (noting that an act is negligent only if "the risk involved in it outweighs its utility," so that one has no duty to act to prevent injury to another "if the benefit to the other is less than, or merely equal to, the utility of action or inaction to the actor"); KEETON ET AL., *supra* note 34, § 29, at 162-63, § 31, at 170-71 (distinguishing between negligent conduct and unavoidable accidents, which do not give rise to tort liability, and noting that even unavoidable accidents are not "entirely inevitable" and therefore can in some sense be prevented).

106. *City of Canton*, 489 U.S. at 392; see *Taylor Indep. Sch. Dist.*, 15 F.3d at 453 (relying on this argument).

107. 489 U.S. at 392 (citing *Rizzo v. Goode*, 423 U.S. 362, 378-80 (1976)).

108. *Rizzo*, 423 U.S. at 380 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 502 (1974)). It is somewhat ironic that *Rizzo*'s federalism concerns were directed at injunctive suits, given that the Court's Eleventh Amendment cases have traditionally viewed damages suits as more intrusive on the states. Accordingly, the Court has interpreted the Eleventh Amendment to bar damage awards that will be paid out of state funds, but to permit the issuance of prospective injunctions against state officials. See *Edelman v. Jordan*, 415 U.S. 651, 663-64 (1974); *Ex parte Young*, 209 U.S. 123, 159-60 (1908); see also *Quackenbush v. Allstate Ins. Co.*, 116 S. Ct. 1712 (1996) (limit-

that the federalism concerns it raised were "initially expounded and perhaps entitled to their greatest weight in cases [seeking] to enjoin a criminal prosecution in progress,"¹⁰⁹ and the Court has been widely criticized for extending those federalism arguments beyond the context in which they were originally raised.¹¹⁰ Third, *Rizzo*'s suggestion that those federalism concerns are implicated in suits against police departments and other executive branch agencies and *City of Canton*'s discomfort with federal courts' "second-guessing" a city's training programs fly directly in the face of Section 1983, which was obviously intended to provide a federal check on the unconstitutional actions of state and city officials and thus, in some sense, to contravene notions of federalism.¹¹¹

Finally, and perhaps most importantly, the federalism interests articulated in *Rizzo* and reiterated in *City of Canton* are sufficiently served in cases involving supervisors by the qualified immunity defense. That defense, which is available to executive branch officials, but not municipalities,¹¹² immunizes a supervisor unless the constitutional rights asserted by the plaintiff were clearly established at the time the violation occurred. As the Supreme Court has described it, qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law."¹¹³ The defense thus ensures that a supervisor will not be held liable simply because a federal court "second-guessed" her decisions and prevents federal judges from intruding unnecessarily into areas of state and local pre-

ing the federal courts' power to dismiss cases under the abstention doctrine to cases seeking injunctive or declaratory relief).

109. 423 U.S. at 380. The Court was referring here to a line of cases that began with *Younger v. Harris*, 401 U.S. 37 (1971). In *Younger*, a federal district court enjoined a pending state prosecution on the grounds that the state statute under which Harris was being prosecuted was unconstitutional on its face. The Supreme Court reversed, reasoning that Harris could challenge the constitutionality of the statute as a defense to the criminal charges, and thus had an adequate remedy at law, and that the federal court's injunction was inconsistent with principles of comity and federalism. See *id.* at 43-54.

110. See Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 65-70 (1984); Owen M. Fiss, *Dombrowski*, 86 YALE L.J. 1103, 1153-60 (1977); *The Supreme Court, 1975 Term—Leading Cases*, 90 HARV. L. REV. 56, 244-47 (1976); Note, *Rizzo v. Goode: Federal Remedies for Police Misconduct*, 62 VA. L. REV. 1259, 1268 (1976).

111. See *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (noting that "[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights," and that "Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights"); see also *Owen v. City of Independence*, 445 U.S. 622, 650-51 (1980) (observing that the Congress that enacted Section 1983 "sought to 'enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity'"); *Monroe v. Pape*, 365 U.S. 167, 182 (1961) (noting that "by virtue of [Section 1983] federal courts . . . sit in judgment on the misdeeds of state officers").

112. See *supra* note 89 and accompanying text.

113. *Malley v. Briggs*, 475 U.S. 335, 341 (1986). For further discussion of the application of this defense in suits filed against supervisory officials, see *infra* notes 245-53 and accompanying text.

rogative. In short, there is no compelling justification for extending the Court's municipal-liability rulings—including *City of Canton v. Harris*—to Section 1983 suits filed against supervisory officials.

In sum, both Section 1983's causation requirement and the Supreme Court's decisions in *Monell* and *Rizzo* suggest that supervisors should not be held vicariously liable for the constitutional wrongs of their subordinates. Beyond that, however, the provision's language, its legislative history, and the Court's precedents provide no real guidance as to what standard of culpability ought to be required in cases involving supervisory officials. The courts of appeals therefore cannot rely on these sources to justify any of the different standards of liability they have adopted—reckless or deliberate indifference, knowledge and acquiescence, or gross negligence—or their unanimous rejection of negligence as the standard of culpability.

III. APPLYING THE VARYING STANDARDS OF SUPERVISORY LIABILITY

Regardless of which standard of supervisory liability they have chosen, the courts of appeals tend to agree that five interrelated factors ought to be considered in applying that standard and determining whether a particular supervisor is liable on the facts of a given case: (1) the extent to which prior similar incidents have occurred;¹¹⁴ (2) the supervisor's response to those prior incidents;¹¹⁵ (3) the supervisor's response to the specific incident on which the suit is based;¹¹⁶ (4) the extent to which the supervisor can be considered a cause of the violation;¹¹⁷ and (5) the nature of the supervisor's awareness of the constitutional misconduct.¹¹⁸ Although the courts agree that these are the relevant considerations, they have not been consistent in applying them. As a result, the courts have reached contrary outcomes in similar cases, seemingly without any regard to the particular standard of supervisory liability they purport to be applying. And all too often, they have been unduly generous in ruling in favor of supervisory officials.

A. Prior Similar Incidents

One common way of demonstrating a supervisor's culpability is to present evidence of prior incidents where the state official who violated the plaintiff's constitutional rights—or other of the supervisor's subordinates—engaged in similar misconduct. Evidence of such prior incidents tends to suggest that the supervisor was reckless in failing to

114. See *infra* notes 119-43 and accompanying text.

115. See *infra* notes 144-64 and accompanying text.

116. See *infra* notes 165-75 and accompanying text.

117. See *infra* notes 176-90 and accompanying text.

118. See *infra* notes 191-209 and accompanying text.

prevent the particular recurrence of the behavior that injured the plaintiff or that she knew of and acquiesced in the violation—and therefore helps the plaintiff satisfy whatever standard of supervisory liability the court has chosen.

In many of these cases, the courts of appeals have noted that one prior incident or a series of unrelated incidents is an insufficient basis on which to impose Section 1983 liability on a supervisor.¹¹⁹ Nevertheless, in *Swint v. City of Wadley*,¹²⁰ the Eleventh Circuit refused to grant summary judgment to a sheriff, in part because he authorized a second narcotics raid on a particular nightclub after having received briefing on the first raid that should have led him to realize that the earlier raid had been conducted in violation of the Fourth Amendment. The sheriff's willingness to authorize a second raid three months later, the court said, showed his deliberate indifference.¹²¹

In cases involving stronger evidence of a pattern of constitutional violations, the courts of appeals have also reached contrary conclusions—regardless of which standard of liability they are applying. In *Shaw v. Stroud*,¹²² for example, the Fourth Circuit found that the family of an arrestee who had been shot and killed by a police officer had presented adequate evidence of deliberate indifference on the part of the officer's former sergeant to survive summary judgment.¹²³ The court reasoned that the sergeant knew of at least three prior incidents, occurring over the course of a one-year period ending more than eighteen months prior to the shooting at issue in the case, where the officer had used excessive force in making an arrest, and that the sergeant had "responded callously and with apparent amusement" upon being informed of those incidents.¹²⁴

119. See *Maldonado-Denis v. Castillo-Rodriguez*, 23 F.3d 576, 582 (1st Cir. 1994); *Shaw v. Stroud*, 13 F.3d 791, 799 (4th Cir.), *cert. denied*, 115 S. Ct. 67-68 (1994); *Sanders v. Brewer*, 972 F.2d 920, 923 (8th Cir. 1992); *Brown v. Crawford*, 906 F.2d 667, 671 (11th Cir. 1990), *cert. denied*, 500 U.S. 933 (1991).

120. 51 F.3d 988 (11th Cir. 1995).

121. See *id.* at 999-1000; see also *Bowen v. Watkins*, 669 F.2d 979, 989 (5th Cir. 1982) ("In some cases . . . the courts have viewed a single abuse as so flagrant that it gives rise to an inference that the supervisory official must have breached his duty of proper supervision.").

122. 13 F.3d 791 (4th Cir.), *cert. denied*, 115 S. Ct. 67-68 (1994).

123. See *id.* at 797, 805.

124. *Id.* at 800. For other similar cases, see *Fundiller v. City of Cooper City*, 777 F.2d 1436, 1443 (11th Cir. 1985) (refusing to dismiss suit against city's director of public safety based on allegation that police officers engaged in pattern of excessive force during arrests); *Voutour v. Vitale*, 761 F.2d 812, 822 (1st Cir. 1985) (denying summary judgment to police chief in excessive force case, based in part on evidence that a subordinate had informed him of three separate incidents involving the improper use of weapons by other officers and had suggested that the officers were not receiving adequate training), *cert. denied*, 474 U.S. 1100 (1986); *Slakan v. Porter*, 737 F.2d 368, 373-75 (4th Cir. 1984) (affirming jury verdict against warden, director of prisons, and secretary of corrections, and finding sufficient evidence that they were deliberately indifferent, based in part on seven incidents in the months preceding the incident involving the plaintiff where prison guards had used high pressure water hoses on other prisoners who did not pose any physical threat), *cert. denied*, 470 U.S. 1035 (1985).

In *Manarite by Manarite v. City of Springfield*,¹²⁵ by contrast, the First Circuit reached the opposite conclusion, even though it was applying the same standard of liability (deliberate indifference) at the same stage of the proceedings (summary judgment), and the case before it involved a greater number of prior similar incidents. In that case, the survivors of a pretrial detainee who committed suicide in jail by hanging himself with his shoelaces filed a Section 1983 suit against a number of defendants, including the chief of police. In affirming the district court's order granting summary judgment to the police chief, the First Circuit concluded that he had not acted with deliberate indifference, even though sixteen detainees had attempted suicide at the lockup in the Springfield police station in the three years prior to the suicide at issue in the case, four had attempted to hang themselves with their shoelaces during the preceding nine months, and police department policy called for removing shoelaces from prisoners.¹²⁶ The court acknowledged that the police chief was guilty of "basic shortcomings" by failing to realize the "unusual number" of suicide attempts involving shoelaces and by failing to "insist that officers implement the specific shoelace policy," and the court even admitted that it was "tempting to say that [the police chief] should have noticed a kind of systemic failure."¹²⁷ Nevertheless, the court reasoned:

[G]iven the large number of detailed policies implemented by any police department and given the fact that suicide reports likely cross a supervisor's desk one at a time, over a period of many weeks or months and mixed with many other urgent matters, it may, in fact, prove difficult for a chief to recollect (or notice) that department policies call for removal of shoelaces, along with belts (but not shirts).¹²⁸

The court therefore concluded that the police chief might well have been negligent, but was not deliberately indifferent.¹²⁹

A defendant is entitled to summary judgment, as the *Manarite* court noted, only when there is no genuine issue of material fact on the question of supervisory liability, so that a reasonable jury could not reach a verdict in the plaintiff's favor.¹³⁰ In addition, the court must examine the record in the light most favorable to the plaintiff.¹³¹ At this stage of the proceedings, it seems improper for the First Circuit to have speculated—apparently, without any basis in the record (at least, none that the court cited)—about the number of policies and

125. 957 F.2d 953 (1st Cir.), *cert. denied*, 506 U.S. 837 (1992).

126. *See id.* at 957.

127. *Id.* at 958.

128. *Id.*

129. *See id.*

130. *See id.* at 955. *See generally* FED. R. CIV. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

131. *See Manarite*, 957 F.2d at 955. *See generally* *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

reports that crossed the police chief's desk and the interval of time passing between the suicide reports, factors that the Fourth Circuit did not find relevant enough even to mention in *Shaw*. It is not inconceivable that, given the chance, the plaintiffs could have shown that the police chief in a city the size of Springfield, Massachusetts,¹³² was guilty of more than negligence in failing to notice the pattern of suicides among the limited population of detainees in the police station's lockup.¹³³

Likewise, in *Jojola v. Chavez*,¹³⁴ the Tenth Circuit affirmed the dismissal of a Section 1983 claim brought by the parents of a fifteen-year-old high school girl who had been sexually assaulted by the school's custodian.¹³⁵ The court dismissed the plaintiffs' claims against the principal of the high school and the superintendent of the school district even though the complaint alleged a number of prior similar incidents: the superintendent had told the plaintiffs that there had been problems involving the custodian prior to his attack on their daughter; another parent had complained to the principal's predecessor that the custodian had made sexual comments to female students; rumors had circulated at the school about the custodian's sexual misconduct; he had lost his job as a bus driver because of inappropriate behavior involving a female student; he had been transferred to the high school after unhooking the bras of female students at the junior high school; and a parent had told the principal of the junior high that the custodian had made a hole in the wall of the girls' locker room and used it to spy on the girls.¹³⁶ Despite these allegations, the court concluded that four incidents and other rumors over the nineteen-year period of the custodian's employment did not constitute a sufficient pattern to demonstrate the supervisors' knowledge of and acquiescence in his misconduct.¹³⁷

The supervisory defendants in *Jojola* prevailed at an even earlier phase of the proceedings than the defendants in *Manarite*—on a motion to dismiss for failure to state a claim. As the Tenth Circuit recognized, a dismissal at this point is justified only if “the plaintiff can

132. In 1984, the year that the suicide at issue in *Manarite* took place, Springfield was the 110th largest city in the country, with a population of 152,761, and it had the 111th highest crime rate in the country. See FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, *UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES, 1984*, at 63-109 (1985). At that time, however, it employed 420 full-time police officers, or 2.75 for every 1,000 residents, *see id.* at 268, which gave it the 65th largest police force in the country and compared favorably with the national average of two full-time officers for each 1,000 residents. *See id.* at 247-305, 240.

133. *Cf.* James E. Robertson, *Fatal Custody: A Reassessment of Section 1983 Liability for Custodial Suicide*, 24 U. TOL. L. REV. 807, 807-08 & n.4 (1993) (noting that between 280 and 1,000 inmates commit suicide each year, making suicide the leading cause of death among prisoners).

134. 55 F.3d 488 (10th Cir. 1995).

135. *See id.* at 490.

136. *See id.* at 490-91.

137. *See id.* at 491.

prove no set of facts to support a claim for relief.”¹³⁸ In addition, the court must “accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff.”¹³⁹ It is not enough, therefore, that the court predicts the plaintiff will ultimately lose on the merits.¹⁴⁰ In light of this standard, it seems premature for the court to have terminated the case at this early stage—possibly before the plaintiffs had any opportunity to conduct discovery¹⁴¹—given that expert testimony might well have established that an adult who engages in the type of sexual behavior toward young girls that the complaint attributed to the custodian is likely to repeat that behavior,¹⁴² and therefore that evidence of even four instances of such egregious behavior over nineteen years is a sufficient pattern to hold the principal and superintendent accountable.¹⁴³

138. *Id.* at 490. See generally *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1357, at 325-36 (2d ed. 1990).

139. *Jojola*, 55 F.3d at 490 (citation omitted). See generally *Gomez v. Toledo*, 446 U.S. 635, 636 n.3 (1980) (citing this principle in a Section 1983 case); 5A WRIGHT & MILLER, *supra* note 138, § 1357, at 304.

140. See 5A WRIGHT & MILLER, *supra* note 138, § 1357, at 340; see also *id.* § 1357, at 321 (noting that motions to dismiss are “viewed with disfavor” and “rarely granted”).

141. The court’s opinion does not indicate that any discovery had taken place, and motions to dismiss are often resolved prior to the onset of discovery. See *id.* § 1356, at 298-99 (distinguishing a motion to dismiss, which is limited to the content of the complaint, from a motion for summary judgment, which involves consideration of the pleadings as well as the results of discovery, and noting that a motion to dismiss is treated as a motion for summary judgment if the court is considering matters outside the pleadings).

142. See KATHLEEN C. FALLER, *CHILD SEXUAL ABUSE: AN INTERDISCIPLINARY MANUAL FOR DIAGNOSIS, CASE MANAGEMENT, AND TREATMENT* 25, 34-35 (1988) (finding that substantial percentage of those guilty of child sexual abuse assaulted more than one victim); BARBARA E. SMITH ET AL., *AMERICAN BAR ASS’N, THE PROBATION RESPONSE TO CHILD SEXUAL ABUSE OFFENDERS: HOW IS IT WORKING?* 10, 9 (1990) (concluding that child sexual abuse offenders are “especially likely to reoffend” because “their sexual orientation to children usually includes a long, pervasive and active history which is extremely difficult to change”); Tracy Dell’Angela, *Sex Offenders’ ‘New Lives’ Can Include Old Behavior*, CHI. TRIB., Aug. 22, 1996, at A1. Discovery might also, of course, have uncovered additional evidence of the custodian’s mistreatment of female students.

143. For other similar cases, see *Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716, 728 (6th Cir. 1996) (affirming order granting summary judgment to high school principal and superintendent in school sexual abuse case because “simply having some incidents of harassment brought to the attention of supervisory defendants is not sufficient to make them liable under section 1983,” and there was no evidence that the supervisors had “either encouraged . . . or directly participated in” the teacher’s “isolated and apparently unrelated incidents of bad behavior”); *Jane Doe “A” v. Special Sch. Dist.*, 901 F.2d 642, 643-46 (8th Cir. 1990) (in suit filed by 11 handicapped children alleging sexual and physical abuse by school bus driver, court granted summary judgment to five supervisors, even though each had received complaints that bus driver had kissed a boy on the bus, and one had been told that bus driver had put his hands down a boy’s pants and pulled down a boy’s pants and spanked him and had also been informed shortly before the bus driver’s arrest that he had been touching boys’ crotches); *Clark v. Evans*, 840 F.2d 876, 884-85 (11th Cir. 1988) (granting summary judgment to Commissioner of State Department of Corrections on the grounds that four incidents in four years where prison officials had ignored court orders to commit mentally ill prisoners was not a sufficient pattern to put him on notice of the need for improved training and supervision); *cf. Thelma D. v. Board of Educ.*, 934 F.2d 929, 933 (8th Cir. 1991) (granting summary judgment to Board of Education in school sexual abuse case on the grounds that “five complaints [of sexual misconduct toward students or former stu-

B. *The Supervisor's Response to Prior Similar Incidents*

The second factor on which the courts of appeals focus in evaluating a particular supervisor's liability—and closely tied to the first, the existence of a pattern of prior similar constitutional violations—is the nature of the supervisor's response to those earlier incidents. As a general rule, the courts are more likely to find a supervisor liable the less adequate the remedial steps she has taken in response to prior violations. Whatever standard of liability the court has chosen, it is obviously easier to conclude that a supervisor who completely ignored a pattern of unconstitutional conduct on the part of her subordinates ought to be accountable for the constitutional injury suffered by the plaintiff. Once again, however, in cases with seemingly similar facts, the courts have reached inconsistent results that do not appear to be tied to the particular standard of liability they purport to be applying.

In *Hale v. Tallapoosa County*,¹⁴⁴ for example, a pretrial detainee who was being held in an overcrowded jail was beaten by an inmate who was in custody on murder charges. Applying a standard of deliberate indifference, the Eleventh Circuit ruled in favor of the plaintiff and reversed the trial court's order granting summary judgment to the sheriff.¹⁴⁵ The court noted that the sheriff admitted that he knew violence among the inmates was a regular occurrence during periods when the jail was overcrowded.¹⁴⁶ Although the sheriff argued that he could not have been deliberately indifferent because he had done something to try to alleviate the problem—he had attempted to raise funds to build a new jail—the court explained that a reasonable jury could nevertheless find that he had been deliberately indifferent because he had "disregard[ed] 'alternative means' or interim measures for reducing the risk of violence."¹⁴⁷ For example, the court observed, the plaintiff had pointed out that the sheriff could have classified the prisoners and segregated the violent ones, could have assigned the inmates to certain cells and bunks rather than letting them choose their own quarters, could have provided training to his subordinates, and

dents] scattered over sixteen years cannot, as a matter of law, be said to comprise a persistent and widespread pattern of unconstitutional misconduct"). *But cf. Doe v. Hillsboro Indep. Sch. Dist.*, 81 F.3d 1395, 1404 (5th Cir. 1996) (concluding that plaintiff's allegation that unidentified school officials had received an unspecified number of reports that unidentified staff members were guilty of sexually abusing unidentified students was enough to justify "at least limited discovery" and denial of motion to dismiss), *reh'g en banc granted*, No. 94-50709, 1996 U.S. App. LEXIS 15741 (5th Cir. June 17, 1996); *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 727-31 (3d Cir. 1989) (refusing to grant summary judgment to high school principal in sexual abuse case where he had received five complaints about sexual assaults involving school personnel over a span of four years, only one of which involved the employee responsible for assaulting the plaintiff), *cert. denied*, 493 U.S. 1044 (1990).

144. 50 F.3d 1579 (11th Cir. 1995).

145. *See id.* at 1580, 1582.

146. *See id.* at 1583.

147. *Id.* at 1584.

could have better monitored the inmates by stationing the jailers so that they could see or hear the cells.¹⁴⁸

In *Wilson v. City of Chicago*,¹⁴⁹ by contrast, the Seventh Circuit ruled for the city in a Section 1983 case filed by an African American man suspected of killing two police officers, who alleged that he had been tortured during police interrogation. Although the complaint was directed at the city, and not the superintendent of police, the court explained its decision in favor of the city on the grounds that the superintendent had not engaged in "personal deliberate wrongdoing" and had not been deliberately or recklessly indifferent to complaints about police brutality—a standard virtually identical to that applied in *Hale*.¹⁵⁰ The court of appeals admitted that a rational jury could have inferred from the frequency of abuse, the number of officers involved in torturing the plaintiff, and the number of complaints of police brutality filed by the African American community that the superintendent knew that the police were "prone to beat up suspected cop killers."¹⁵¹ And the court conceded that the superintendent had been "careless, maybe even grossly so," in responding to those complaints.¹⁵² But, unlike the Eleventh Circuit in *Hale*, the court was impressed by the fact that the superintendent had taken *some* steps to eliminate the practice: he had referred all complaints to the police department office responsible for investigating charges of police misconduct. Although the court acknowledged that that office "had done nothing except lose a lot of the complaints," the ineffectual nature of the superintendent's remedial efforts was inadequate in the court's mind to demonstrate that he had acquiesced in the violence.¹⁵³ "Failing to eliminate a practice cannot be equated to approving it," the court concluded.¹⁵⁴

Likewise, in *Busby v. City of Orlando*,¹⁵⁵ an Eleventh Circuit opinion that predated *Hale*, the court affirmed an order granting a directed verdict to a police chief even though he had apparently done nothing to remedy problems of racial harassment and discrimination in the police department. The Eleventh Circuit acknowledged that the chief was aware that various employees at the airport where the plaintiff worked as a security officer had complained about race discrimination and also knew that officers in his employ had used racial epithets.¹⁵⁶ The court also noted that the chief had failed to enact a

148. See *id.* at 1583-84.

149. 6 F.3d 1233 (7th Cir. 1993), *modified on other grounds*, Nos. 89-3747 & 90-2216, 1993 U.S. App. LEXIS 31896 (7th Cir. Dec. 8, 1993), *cert. denied*, 114 S. Ct. 1844 (1994).

150. *Id.* at 1240-41.

151. *Id.* at 1240.

152. *Id.*

153. *Id.*

154. *Id.*

155. 931 F.2d 764 (11th Cir. 1991).

156. See *id.* at 782.

written policy prohibiting the use of racial slurs,¹⁵⁷ and the dissent pointed out that the chief could not remember ever disciplining an employee for racial slurs or discrimination.¹⁵⁸ Thus, the chief in *Busby*—unlike the supervisory officials in *Hale* and *Wilson*—had apparently failed to take *any* steps in response to the prior incidents. Nevertheless, the Eleventh Circuit concluded that the plaintiff had presented insufficient evidence to implicate the chief in her harassment and discrimination claims.¹⁵⁹

In other harassment cases, however, courts have refused to rule in favor of supervisory officials who ignored prior complaints of harassing behavior. For example, in *Lipsett v. University of Puerto Rico*,¹⁶⁰ the First Circuit observed that once a supervisor is notified of a problem, "it is reasonable to infer that the failure to take [corrective] steps . . . constitutes a choice 'from among various alternatives.'"¹⁶¹ Accordingly, the court denied summary judgment to supervisory officials who had failed to investigate the plaintiff's charges of gender harassment and discrimination.¹⁶² Likewise, in *Bator v. Hawaii*,¹⁶³ the Ninth Circuit declined to grant summary judgment to a supervisor who had ignored the plaintiff's complaints of sexual and racial harassment, reasoning that "complete inaction in the face of claimed harassment cannot be objectively reasonable conduct."¹⁶⁴

157. See *id.*

158. See *id.* at 788 (Johnson, J., dissenting).

159. Although the court's reasoning focuses on the question of causation, see *infra* notes 184-86 and accompanying text, and not on the nature of the chief's response to these prior incidents or the standard of supervisory liability, the court's causation analysis is relevant here. In noting that a supervisor can be held liable if there is a causal link between her conduct and the violation of the plaintiff's rights, the court cited *Fundiller v. City of Cooper City*, 777 F.2d 1436, 1443 (11th Cir. 1985). See *Busby*, 931 F.2d at 782. *Fundiller* recognized the nexus between the causation question and the supervisor's response to prior incidents, noting that the necessary causal connection "can be established when a history of widespread abuse puts the responsible supervisor on notice of the need for improved training or supervision, and the official fails to take corrective action." 777 F.2d at 1443.

160. 864 F.2d 881 (1st Cir. 1988).

161. *Id.* at 902 (emphasis omitted).

162. See *id.*

163. 39 F.3d 1021 (9th Cir. 1994).

164. *Id.* at 1029. For other similar cases, see *Greason v. Kemp*, 891 F.2d 829, 837-40 (11th Cir. 1990) (affirming denial of summary judgment to various supervisory officials who failed to investigate or respond even though they knew prison's psychiatric staff was understaffed and also knew of previous self-mutilations by inmate who ultimately committed suicide); *Fundiller*, 777 F.2d at 1443 (refusing to dismiss suit against city's director of public safety because plaintiff alleged that the director was responsible for disciplining police officers and failed to take steps to remedy a pattern of excessive force); *Slakan v. Porter*, 737 F.2d 368, 374 (4th Cir. 1984) (affirming jury verdict against warden and director of prisons and finding sufficient evidence that they were deliberately indifferent, based in part on evidence that they had failed to implement commission's recommendation to restrict the use of water hoses on prisoners), *cert. denied*, 470 U.S. 1035 (1985).

C. *The Supervisor's Response to the Particular Incident in Question*

The third factor that some courts of appeals consider in determining a supervisor's liability for her subordinate's constitutional wrong is the nature of the supervisor's response to the particular incident that led to the suit. Although some courts refuse to take this factor into account on the grounds that the supervisor's conduct subsequent to the constitutional violation cannot in any way have contributed to it,¹⁶⁵ other courts view the supervisor's failure to respond appropriately to the violation as evidence that she was deliberately indifferent to it or acquiesced in it and therefore met whatever standard of culpability the court has chosen.¹⁶⁶ But even courts that acknowledge the relevance of this factor use it inconsistently in determining whether a supervisor should be held liable in a particular case.

In *Hegarty v. Somerset County*,¹⁶⁷ for example, the First Circuit granted summary judgment to the county sheriff, who had been sued in connection with the shooting death of a suspect. The court acknowledged that it was "entirely understandable" that the plaintiff would "fault" the sheriff for refusing to discipline the officers responsible for the shooting, as recommended in an investigative report issued by the state attorney general's office, and for refusing to adopt the recommendations of a citizen review board the sheriff himself had convened to investigate the incident.¹⁶⁸ Nevertheless, the court noted that the sheriff had temporarily suspended the officers involved and concluded that his conduct following the shooting was inadequate on its own to demonstrate the deliberate indifference necessary for supervisory liability in that jurisdiction.¹⁶⁹

In *Larez v. City of Los Angeles*,¹⁷⁰ by contrast, the Ninth Circuit upheld a jury verdict against the chief of police in a Section 1983 case alleging that several police officers acted in violation of the Fourth Amendment by conducting an unreasonable search of the plaintiffs' home and using an excessive amount of force.¹⁷¹ In finding the evidence sufficient to sustain the jury's finding that the police chief had acquiesced in these violations or had been reckless or callously indifferent to the plaintiffs' rights—a standard no more lenient than that applied by the First Circuit in *Hegarty*—the court relied exclusively on

165. See *Febus-Rodriguez v. Betancourt-Lebron*, 14 F.3d 87, 95 n.11 (1st Cir. 1994) (alternate holding).

166. See *Hegarty v. Somerset County*, 53 F.3d 1367, 1380 (1st Cir.), cert. denied, 116 S. Ct. 675 (1995); *Wright v. Smith*, 21 F.3d 496, 501 (2d Cir. 1994); *Walker v. Norris*, 917 F.2d 1449, 1457 (6th Cir. 1990).

167. 53 F.3d 1367 (1st Cir.), cert. denied, 116 S. Ct. 675 (1995).

168. *Id.* at 1380.

169. See *id.* at 1380. For a similar case, see *Febus-Rodriguez*, 14 F.3d at 95 n.11 (concluding that mayor's "single poorly performed investigation" of this incident "may reflect negligence, but [not] callous or reckless indifference").

170. 946 F.2d 630 (9th Cir. 1991).

171. See *id.* at 646.

the fact that the chief had not disciplined the officers involved in the incident and had not established new procedures to avoid similar violations in the future.¹⁷²

Likewise, in *McKinnon v. City of Berwyn*,¹⁷³ another case involving a police chief's responsibility for his subordinates' Fourth Amendment violations, the Seventh Circuit found the evidence sufficient to get to the jury and therefore reversed the trial court's order granting the chief judgment notwithstanding the verdict.¹⁷⁴ The court of appeals observed that the police chief's failure to take any disciplinary action in connection with the violation of the plaintiff's rights, "while not in itself causing [the plaintiff] any injury, was evidence from which the jury could have inferred (in combination with other evidence) that [the police chief] was indifferent to the violation of constitutional rights by his officers."¹⁷⁵

D. Causation

Given Section 1983's requirement that the defendant "subject[]" the plaintiff to a violation of her constitutional rights or "cause[] [her] to be [so] subjected,"¹⁷⁶ and the Supreme Court's requirement in *Rizzo v. Goode* of an "affirmative link" between the supervisory official and the plaintiff's constitutional injury,¹⁷⁷ causation issues often arise in cases involving supervisory liability. A fourth factor, then, that the courts of appeals use in determining whether a supervisor can be held accountable for a particular constitutional deprivation is the extent to which it can be said that the supervisor's conduct caused the violation. The courts' discussion of this factor is often intertwined with their discussion of one or more of the three factors described above—most notably, the supervisor's response to prior similar incidents. But because the causation issue is analytically somewhat distinct from those other factors, I address it separately here.

Most courts of appeals appear to acknowledge that the requisite causal link can be demonstrated by proof that the supervisor failed to respond effectively to prior similar incidents. A number of courts have noted, for example, that causation "can be established . . . by setting in motion a series of acts by others which the [supervisor] knows or reasonably should know would cause others to inflict the constitutional injury,"¹⁷⁸ and "may be supplied by [the] tort principle

172. See *id.* The police chief sued in *Larez* was Darryl Gates, who also occupied that office at the time of the Rodney King beating. See *supra* note 6 and accompanying text.

173. 750 F.2d 1383 (7th Cir. 1984).

174. See *id.* at 1391.

175. *Id.*

176. See *supra* note 5.

177. 423 U.S. 362, 371 (1976); see *supra* note 17 and accompanying text.

178. *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir. 1978); cf. KEETON ET AL., *supra* note 34, § 44, at 303-06 (describing established tort law principles in similar fashion). For examples of other cases using the same standard, see *Tilson v. Forrest City Police Dep't*, 28 F.3d 802, 806-07

that holds a person liable for the natural consequences of his actions."¹⁷⁹ Consistent with these principles, some courts have observed that the necessary causal link can be established by proof that the supervisor failed to act in the face of a history of widespread abuse that put her on notice of the need for corrective action.¹⁸⁰ These rulings make sense because state officials who are not disciplined for constitutional wrongdoing learn that they can violate rights without suffering any consequences, and the supervisor's failure to respond to their misconduct thus "create[s] the background and climate which . . . preordain[]" the constitutional violations.¹⁸¹

Nevertheless, a few cases seemingly reject this argument and rely on the causation requirement as grounds for declining to impose liability on a supervisor. In most of these cases, the courts provide no real explanation for their conclusion that the plaintiff has not satisfactorily proven a causal nexus, and there appears to be no principled distinction—whether in terms of the standard of supervisory liability or any other factor—between these cases and the majority of cases that come to a contrary conclusion.

In *Febus-Rodriguez v. Betancourt-Lebron*,¹⁸² for example, the First Circuit granted summary judgment to the superintendent of police in a case involving a police officer's excessive use of force, in part because the court failed to see a causal link between the superintendent's failure to discipline the officer for prior misdeeds and the con-

n.10 (8th Cir. 1994) (quoting jury instructions), *cert. denied*, 115 S. Ct. 1315 (1995); *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991); *Snell v. Tunnell*, 920 F.2d 673, 700 (10th Cir. 1990), *cert. denied*, 499 U.S. 976 (1991); *Conner v. Reinhard*, 847 F.2d 384, 397 (7th Cir.), *cert. denied*, 488 U.S. 856 (1988).

179. *Shaw v. Stroud*, 13 F.3d 791, 799 (4th Cir.) (citation omitted), *cert. denied*, 115 S. Ct. 67-68 (1994); *see also* *Monroe v. Pape*, 365 U.S. 167, 187 (1961) (noting that Section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions"); *Nicks v. Missouri*, 67 F.3d 699, 702-03 (8th Cir. 1995); *cf.* *KEETON ET AL.*, *supra* note 34, § 43, at 282 (describing established tort law principle to this effect). *But cf.* *Hegarty v. Somerset County*, 53 F.3d 1367, 1380 (1st Cir.) (noting that requirement of affirmative link "contemplates proof that the supervisor's conduct led inexorably to the constitutional violation"), *cert. denied*, 116 S. Ct. 675 (1995).

180. *See* *Brown v. Crawford*, 906 F.2d 667, 671 (11th Cir. 1990), *cert. denied*, 500 U.S. 933 (1991); *Haynesworth v. Miller*, 820 F.2d 1245, 1261 (D.C. Cir. 1987); *Hinshaw v. Doffer*, 785 F.2d 1260, 1263 (5th Cir. 1986); *Fundiller v. City of Cooper City*, 777 F.2d 1436, 1443 (11th Cir. 1985).

181. *LaMarca v. Turner*, 995 F.2d 1526, 1539 (11th Cir. 1993) (making this argument in the context of suit brought against superintendent of prison by prisoners who had been assaulted and threatened by other inmates), *cert. denied*, 114 S. Ct. 1189 (1994); *see also* *Hale v. Tallapoosa County*, 50 F.3d 1579, 1584-85 (11th Cir. 1995) (same); *Shaw*, 13 F.3d at 800 (refusing to grant summary judgment and rule out proof of causation even though supervisor who had failed to discipline police officer for prior uses of excessive force had been transferred 15 months prior to the shooting at issue in this case); *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 730 (3d Cir. 1989) (noting that jury could find that principal's actions of "discourag[ing] and minimiz[ing] reports of sexual misconduct by teachers . . . 'encourag[ed] a climate to flourish where innocent girls were victimized'"), *cert. denied*, 493 U.S. 1044 (1990); *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 552, 566 (1st Cir. 1989) (observing that police superintendent's "employment of a disciplinary system that was grossly deficient in a number of significant areas made it highly likely that the police officers under his command would engage in [unconstitutional] conduct").

182. 14 F.3d 87 (1st Cir. 1994).

stitutional injury inflicted on the plaintiff. The court explained, "The inference that because [the officer] had not been sanctioned with respect to . . . five [prior] incidents, he believed he could get away with anything, including assaulting [the plaintiff], is simply too tenuous."¹⁸³

Similarly, in *Busby v. City of Orlando*,¹⁸⁴ the Eleventh Circuit focused on the issue of causation in explaining its decision to affirm the directed verdict granted to the chief of police in a racial discrimination and harassment case. Although the court acknowledged that the chief was aware that other employees had complained of race discrimination, and that some of his officers used racial epithets, and nevertheless had failed to promulgate a written policy prohibiting the use of racial slurs, it ruled that this evidence was not even adequate to get to the jury on the question of causation.¹⁸⁵ Its sole explanation for this conclusion is as follows:

[The chief's] failure to enact such a policy, even in light of his awareness of general complaints and the use of racial epithets, . . . without more, does not constitute substantial evidence such that reasonable minds could disagree as to whether a causal connection existed between his actions and the deprivation of [the plaintiff's] rights.¹⁸⁶

In a very similar case, *Andrews v. City of Philadelphia*,¹⁸⁷ by contrast, the Third Circuit affirmed a jury verdict against a supervisor in a sexual harassment case, recognizing that "the jury reasonably could have determined that [the supervisor's] failure to investigate the source of the problem implicitly encouraged squad members to continue in their abuse" of the plaintiff.¹⁸⁸ Likewise, in *Lipsett v. University of Puerto Rico*,¹⁸⁹ a First Circuit opinion predating *Febus-Rodriguez*, the court noted that the supervisory defendants' failure to respond to the plaintiff's complaints of sexual harassment "discredited [her] and sent a message to the male offenders that they could continue to drive her and other women out of the Program with impunity."¹⁹⁰

E. The Supervisor's Awareness of the Constitutional Misconduct

The final factor that the courts of appeals tend to consider in determining a supervisor's liability for her subordinate's unconstitutional

183. *Id.* at 94. Although the five prior incidents were distinguishable from the excessive use of force alleged by the plaintiffs—a point the court noted, *see id.* at 93-94 & n.7—the court relied on the causation argument quoted in text as a separate ground for its decision.

184. 931 F.2d 764 (11th Cir. 1991).

185. *See id.* at 782. For further discussion of the facts and reasoning of *Busby*, *see supra* notes 155-59 and accompanying text.

186. 931 F.2d at 782.

187. 895 F.2d 1469 (3d Cir. 1990).

188. *Id.* at 1479.

189. 864 F.2d 881 (1st Cir. 1988).

190. *Id.* at 907.

behavior is the nature of the supervisor's awareness of the risk of constitutional injury. The greater the supervisor's awareness of the problem, the more culpable she seems and the more likely the courts are to conclude that their particular standard of supervisory liability is met.¹⁹¹ Like the causation issues discussed in the preceding section, the courts often analyze the supervisor's awareness in the context of addressing one of the first three factors described above—typically, the supervisor's response either to prior similar incidents or to the incident in question.

As noted above in part I, some courts require that a supervisor must have actually been aware of the constitutional misconduct before she can be held liable under Section 1983, whereas other courts apply the more lenient standard of constructive knowledge, and still others have adopted an intermediate standard that imposes liability if the supervisor was aware of a risk of constitutional injury.¹⁹² Regardless of which approach they take on this issue, many courts find sufficient evidence of knowledge if the supervisor was informed of the risk of constitutional injury by either her subordinates¹⁹³ or the plaintiff.¹⁹⁴ Another common way of demonstrating the supervisor's awareness is

191. Cf. MODEL PENAL CODE § 2.02 (Official Draft 1985) (creating different degrees of culpability based on extent of defendant's awareness of the risk).

192. See *supra* notes 35-37 and accompanying text.

193. See *Keenan v. City of Philadelphia*, 983 F.2d 459, 467 (3d Cir. 1992) (affirming jury verdict and finding sufficient evidence of supervisor's actual knowledge where subordinate advised supervisor of plaintiff's complaints of gender discrimination); *Greason v. Kemp*, 891 F.2d 829, 837, 839 (11th Cir. 1990) (refusing to grant summary judgment and concluding that jury could infer that a reasonable person would have been aware of risk where prison psychiatrist told supervisors about inadequate staffing); cf. *Bailey v. Wood*, 909 F.2d 1197, 1199-1200 (8th Cir. 1990) (on appeal from jury verdict in plaintiff's favor, court assumes evidence was sufficient to show that warden knew plaintiff was at risk from other inmate, because he had received reports from his staff regarding that inmate).

194. See, e.g., *Gentry v. Duckworth*, 65 F.3d 555, 561 (7th Cir. 1995) (refusing to grant summary judgment to superintendent because one reasonable construction of prisoner's allegations was that superintendent was aware that prisoner had been denied access to legal materials by virtue of the letters prisoner had written him); *Wright v. Smith*, 21 F.3d 496, 502 (2d Cir. 1994) (reversing grant of summary judgment to superintendent, who had been served with plaintiff's habeas corpus petition and thus was on notice that plaintiff had been confined without meaningful hearing); *Keenan*, 983 F.2d at 467 (affirming jury verdict and finding sufficient evidence of supervisor's actual knowledge where plaintiff met with supervisor and informed him of subordinate's discriminatory treatment); *Madewell v. Roberts*, 909 F.2d 1203, 1208 (8th Cir. 1990) (denying summary judgment to warden and director of Department of Corrections, who had personal knowledge of prison conditions because they had reviewed grievances filed by plaintiffs); *Howard v. Adkison*, 887 F.2d 134, 138 (8th Cir. 1989) (affirming denial of judgment notwithstanding the verdict and concluding that rational jury could have found that supervisory official knew or should have known of cell conditions, where plaintiff had repeatedly complained to him); *Thomas v. Booker*, 784 F.2d 299, 301-02 (8th Cir.) (en banc) (affirming jury verdict and finding sufficient evidence that supervisory prison official knew or should have known of danger to prisoner where prisoner had told him of fears for his safety), *cert. denied*, 476 U.S. 1117 (1986); *Wright v. Collins*, 766 F.2d 841, 850 (4th Cir. 1985) (noting that "[r]eceipt of letters by prison officials may be evidence of personal knowledge of unconstitutional conditions" at prison).

by presenting evidence that the mistreatment was so pervasive,¹⁹⁵ or the prior history of abuse so widespread,¹⁹⁶ that the supervisor must have been aware of it.¹⁹⁷ In addition, a number of courts of appeals have inferred from the presence of news reports publicizing the constitutional misconduct that the supervisor must have been aware of the problem.¹⁹⁸ Some courts have also relied on statements made by other state officials—typically, those who work for the supervisor—indicating their recognition of the problem as evidence that the supervisor must likewise have been aware.¹⁹⁹ And finally, some courts have reasoned that the supervisor must have been aware of the problem based on rumors circulating in the workplace.²⁰⁰

Nevertheless, some courts have ruled in favor of supervisors on the ground that they were unaware of the problem, even though the plaintiffs presented proof along the lines described above that presumably would have satisfied other courts. In *Jojoba v. Chavez*,²⁰¹ for

195. See, e.g., *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1479 (3d Cir. 1990) (affirming jury verdict and finding sufficient evidence of actual knowledge where the use of abusive language and display of pornographic photos were “so offensive and regular that they could not have gone unnoticed” by supervisors); cf. *Wilson v. City of Chicago*, 6 F.3d 1233, 1240 (7th Cir. 1993) (noting, in context of suit against city, that rational jury could infer that superintendent of police knew of misbehavior by police officers, based in part on the number of officers involved in the violation in question), *modified on other grounds*, Nos. 89-3747 & 90-2216, 1993 U.S. App. LEXIS 31896 (7th Cir. Dec. 8, 1993), *cert. denied*, 114 S. Ct. 1844 (1994).

196. See, e.g., *Hinshaw v. Doffer*, 785 F.2d 1260, 1263 (5th Cir. 1986) (affirming jury verdict for plaintiff and noting that “‘knowledge may be imputed’” to a supervisor based on a “history of widespread abuse”); *Slakan v. Porter*, 737 F.2d 368, 375 (4th Cir. 1984) (affirming verdict in plaintiff’s favor and observing that “the prevalence of the practice” is “a circumstantial indication” that the supervisor was aware of it), *cert. denied*, 470 U.S. 1035 (1985); cf. *Wilson*, 6 F.3d at 1240 (making this argument in connection with suit against city).

197. These cases are not necessarily applying a standard of constructive knowledge—inquiring what the supervisor *should* have known—but are instead inferring that the supervisor *must* have actually known about the problem. See generally *Farmer v. Brennan*, 114 S. Ct. 1970, 1981 (1994) (noting that “a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious”) (citing 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 3.7(d), at 335 (1986)).

198. See *Meriwether v. Coughlin*, 879 F.2d 1037, 1048 (2d Cir. 1989) (affirming jury verdict and finding sufficient evidence that supervisor had actual or constructive knowledge); *Slakan*, 737 F.2d at 375 (applying standard requiring deliberate indifference, tacit authorization, or acquiescence and affirming jury verdict); *McClelland v. Facticeau*, 610 F.2d 693, 697 (10th Cir. 1979) (applying standard requiring actual or constructive knowledge and reversing grant of summary judgment to two supervisory officials).

199. See *Meriwether*, 879 F.2d at 1048 (applying standard of actual or constructive knowledge and affirming jury verdict where supervisor’s press secretary had issued statement to the press); *Slakan*, 737 F.2d at 375 (affirming jury verdict and observing that secretary of Department of Corrections “must have been aware of the commission report recommending tighter controls on the use of water hoses” in prison); cf. *Angarita v. St. Louis County*, 981 F.2d 1537, 1545 (8th Cir. 1992) (affirming jury verdict and concluding that jury could reasonably infer that police superintendent knew that his subordinates had coerced the plaintiffs to resign from their jobs, in part because the subordinates told the plaintiffs during interrogation that the superintendent would not allow them to leave with their jobs).

200. See, e.g., *Meriwether*, 879 F.2d at 1048 (2d Cir. 1989) (applying standard of actual or constructive knowledge and affirming jury verdict).

201. 55 F.3d 488 (10th Cir. 1995). The facts and reasoning of this case are also discussed *supra* at notes 134-43.

example, the Tenth Circuit affirmed dismissal of a Section 1983 claim filed against the supervisors of a high school custodian who allegedly assaulted the plaintiffs' daughter. The court concluded that the plaintiffs had not shown that the supervisory officials—the high school principal and the superintendent of the school district—had either actual or constructive knowledge of the custodian's sexual contact with students, even though the complaint alleged that the principal of the junior high school and the previous high school principal had received complaints about the custodian, that rumors had circulated at the school regarding his behavior, and that the custodian had lost his job as a school bus driver and had been transferred from the junior high to the high school because of his mistreatment of female students.²⁰² In fact, the court even dismissed the plaintiffs' allegation that the superintendent had made a statement to them admitting that "problems involving [the custodian] had arisen prior to the attack" on their daughter as only "one nonspecific statement."²⁰³

Likewise, in *Rode v. Dellarciprete*,²⁰⁴ the Third Circuit affirmed the dismissal of the governor and state attorney general from a suit claiming that the plaintiff had been suspended from her job with the state police in retaliation for exercising her First Amendment rights. The plaintiff's complaint alleged that numerous newspaper articles had appeared throughout the state publicizing the retaliatory harassment of herself and a coworker, that a resolution had been introduced in the state legislature calling for an investigation of retaliatory measures taken against employees of the state police, that grievances and complaints had been filed with the governor and lieutenant governor, and that she herself had filed a grievance with the governor.²⁰⁵ In addition, the court of appeals observed that the state police had been involved in what the court termed a "protracted history of litigation . . . charging it with racial animus in its employment practices," and that the state legislature had held hearings on the problem of racial discrimination by the state police.²⁰⁶ Nevertheless, the court concluded that the plaintiff had "fail[ed] to allege knowledge and acquiescence with the required particularity."²⁰⁷ Although the court rightly noted that Pennsylvania is "a large state employing many thousands of employees," it was wrong to go on to suggest that giving the plaintiff an opportunity to substantiate her allegations "would subject the Governor to potential liability in any case in which an aggrieved employee merely transmitted a complaint" to the office of the governor

202. See 55 F.3d at 490-91.

203. *Id.* at 491.

204. 845 F.2d 1195 (3d Cir. 1988).

205. See *id.* at 1208.

206. *Id.* at 1201-02.

207. *Id.* at 1208.

or lieutenant governor.²⁰⁸ The plaintiff's complaint cited much more than the filing of a single grievance as evidence of the governor's knowledge of the problem, and it might well have been, as courts have found in other cases, that the number of complaints alleging discrimination by the state police or the amount of attention given to the issue suggested that "the prevalence of the practice was itself a circumstantial indication that administrators at *all* levels knew and approved" of it.²⁰⁹

IV. MAKING SENSE OF SUPERVISORY LIABILITY

As is apparent from the description of the case law in parts I and III, the federal courts of appeals have not reached a consensus on the extent to which supervisors are to be held accountable for the constitutional wrongdoing of their subordinates. The courts have adopted different standards of liability, and, in implementing those standards, they have inconsistently applied the factors relevant in determining a supervisor's liability on the facts of a given case. As a result of this confusion, cases with similar facts have been decided differently by different courts, and sometimes even by different panels in the same circuit.

Supervisory liability is an issue that ought to be resolved uniformly throughout the country. Unlike certain procedural issues that arise in Section 1983 cases and are not treated identically in every jurisdiction,²¹⁰ the nature of supervisory liability is a substantive question that calls for a uniform rule.²¹¹ As the courts of appeals have recognized in rejecting state law as a source for the standard of supervisory liability,²¹² there ought to be a national standard governing the extent to which a supervisory state official can be held responsible for

208. *Id.*

209. *Slakan v. Porter*, 737 F.2d 368, 375 (4th Cir. 1984) (emphasis added), *cert. denied*, 470 U.S. 1035 (1985).

210. Relying on 42 U.S.C. § 1988(a) (1994), which instructs courts in Section 1983 cases to apply "the common law, as modified and changed by the constitution and statutes of the [forum] State," in cases where federal law is "deficient," the Supreme Court has held that statute of limitations and survival issues that arise in Section 1983 cases are to be governed by state rules and may therefore vary from jurisdiction to jurisdiction. See *Wilson v. Garcia*, 471 U.S. 261 (1985) (length of limitations period); *Board of Regents v. Tomanio*, 446 U.S. 478 (1980) (tolling of limitations period); *Robertson v. Wegmann*, 436 U.S. 584 (1978) (survival of actions).

211. *Cf. Felder v. Casey*, 487 U.S. 131, 152 (1988) (characterizing state's notice-of-claim requirement as "more than a mere rule of procedure," but instead "a substantive condition on the right to sue governmental officials and entities," and therefore refusing to apply it in Section 1983 cases); *Wilson v. Garcia*, 471 U.S. 261, 269-70 (1985) (noting that Congress "did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action" and citing "the federal interest in uniformity," the Court holds that characterization of Section 1983 claims for statute of limitations purposes is a question of federal law); Kreimer, *supra* note 45, at 615 (observing that the Supreme Court has resolved issues relating to damages and immunities in Section 1983 cases "without even a passing reference to the state rules to which section 1988 is thought to direct attention" and, as a result, "a substantial degree of national uniformity increasingly prevails").

212. See *supra* note 26.

constitutional wrongs—just as there is for lower-level public officials and municipalities. The nature of a plaintiff's constitutional rights should not vary from jurisdiction to jurisdiction, and neither should the constitutional duty of supervisory officials.

In addition to being uniform, the standard of supervisory liability ought to be a meaningful one. As the Court recognized in *Monell v. Department of Social Services*, Congress intended that Section 1983 be "broadly construed" so as to "give a broad remedy for violations of federally protected civil rights."²¹³ The statute's twin goals of compensating the victims of constitutional wrongs and deterring constitutional violations²¹⁴ are undermined when the only defendant realistically subject to suit is the subordinate state official directly responsible for violating the plaintiff's rights. Rather, Section 1983 plaintiffs need an effective remedy against the governmental body that employed the state official and/or the official who supervised her. High-ranking supervisors and employers are the ones who have the power and resources to take the steps necessary to avoid future violations. Deterrence of wrongdoing is therefore maximized when they are exposed to liability and thus have an incentive to implement the necessary reforms.²¹⁵

Recognizing the importance of providing a meaningful remedy against someone other than a low-level employee, other areas of the law accord those who are wronged by an employee a ready cause of action against either the employer or the supervisor. For example, in

213. 436 U.S. 658, 686, 685 (1978); see also *Gomez v. Toledo*, 446 U.S. 635, 639 (1980) ("As remedial legislation, Section 1983 is to be construed generously to further its primary purpose.").

214. See *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 268 (1981); *Owen v. City of Independence*, 445 U.S. 622, 651 (1980).

215. See PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* xvii-xviii (1983) (noting that "[h]igh-level supervisory or policymaking officials tend to be more visible, financially capable of satisfying a judgment, and well positioned to change official policy"); see also MICHAEL AVERY & DAVID RUDOVSKY, *POLICE MISCONDUCT: LAW AND LITIGATION* § 3.4, at 3-22 (2d ed. 1995); cf. *United States v. Park*, 421 U.S. 658, 668-69, 671-72 (1975) (citing similar policies in support of decision to hold high-level corporate officials criminally liable for violations of food and drug laws).

If the state has a practice of indemnifying public officials for damages assessed against them in Section 1983 cases, see generally SCHUCK, *supra*, at 85-87, a prevailing plaintiff should, in theory, receive full compensation by suing the subordinate state official who violated her rights. Nevertheless, creating a meaningful remedy against supervisors is important to fully realize Section 1983's compensatory purpose for several reasons. First, the state's indemnification policy may be limited, and the state may be more likely to indemnify a higher ranking official. See *id.*; AVERY & RUDOVSKY, *supra*, at 3-22. Second, subordinate state officials may be more successful in raising the qualified immunity defense. See *infra* notes 251-52 and accompanying text. Finally, juries may be more sympathetic to lower-level officials and thus less inclined to return verdicts against them. See Douglas L. Colbert, *Bifurcation of Civil Rights Defendants: Undermining Monell in Police Brutality Cases*, 44 HASTINGS L.J. 499, 548-49 (1993); Jon O. Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447, 456 (1978) (noting that jurors are often unaware of the state's indemnification policies and therefore "understandably succumb[] easily to the argument, stated or implied, that recovery should be denied because the damages must come from the paycheck of a hard-working, underpaid police officer").

employment discrimination cases brought under Title VII,²¹⁶ employers—including state and local governments²¹⁷—are routinely held strictly liable for the actions of their employees.²¹⁸ Ironically, the current debate in the Title VII arena is whether liability should *also* be extended to the individual employees responsible for those discriminatory acts.²¹⁹

Under the law of torts—a body of law that the Supreme Court often looks to in fashioning the rules governing Section 1983 cases²²⁰—an employer is liable for any tort committed by an employee acting within the scope of her employment.²²¹ Strict liability is considered appropriate in such cases because “the idea of responsibility for the harm done by the servant’s activities follow[s] naturally” from the employer’s ability to “exercise control over the physical activities of the servant,” and because “it would be unjust to permit an employer to gain from the intelligent cooperation of others without being responsible for the mistakes, the errors of judgment and the frailties of those working under his direction and for his benefit.”²²² Even when the employee acts outside the scope of her employment, the employer is still liable under certain circumstances, including whenever the employer is negligent or reckless.²²³

216. 42 U.S.C. § 2000e (1994).

217. See MACK A. PLAYER, *EMPLOYMENT DISCRIMINATION LAW* § 5.09 (1988).

218. The lone exception comes in hostile environment sexual harassment cases, where the Supreme Court has rejected strict vicarious liability for employers. See Maria M. Carillo, *Hostile Environment Sexual Harassment by a Supervisor Under Title VII: Reassessment of Employer Liability in Light of the Civil Rights Act of 1991*, 24 COLUM. HUM. RTS. L. REV. 41, 75 (1992-1993) (citing *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986)). Although the courts apply various standards of liability in these harassment cases, see Rachel E. Lutner, Note, *Employer Liability for Sexual Harassment: The Morass of Agency Principles and Respondent Superior*, 1993 U. ILL. L. REV. 589, 598-602, plaintiffs can generally recover from employers that had actual or constructive knowledge of the harassment and failed to take prompt remedial action. See 1 MARK A. ROTHSTEIN ET AL., *EMPLOYMENT LAW* 490-91 (1994).

219. See Scott B. Goldberg, Comment, *Discrimination by Managers and Supervisors: Recognizing Agent Liability Under Title VII*, 143 U. PA. L. REV. 571, 573-74 (1994) (citing conflicting cases).

220. See *Wilson v. Garcia*, 471 U.S. 261, 276-78 (1985) (holding that state statute of limitations periods for personal injury tort suits are to be applied in Section 1983 cases); *Smith v. Wade*, 461 U.S. 30, 38-48 (1983) (adopting tort punitive damages rules for Section 1983 cases); *Carey v. Piphus*, 435 U.S. 247, 258 (1978) (using tort damages principles as “the appropriate starting point for the inquiry under § 1983”); *Monroe v. Pape*, 365 U.S. 167, 187 (1961) (observing that Section 1983 “should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions”). See generally *Monell v. Department of Social Servs.*, 436 U.S. 658, 691 (1978) (referring to a Section 1983 violation as a “constitutional tort”); *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976) (noting that Section 1983 “creates a species of tort liability”); Sheldon Nahmod, *Section 1983 Discourse: The Move from Constitution to Tort*, 77 GEO. L.J. 1719 (1989) (describing the Supreme Court’s shift away from “constitutional rhetoric” and toward “tort rhetoric” in its Section 1983 opinions).

221. See RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958). Although the corporation is responsible for the torts of its employees, the corporate officers are usually not liable unless they participated personally in the tortious conduct. See HARRY G. HENN & JOHN R. ALEXANDER, *LAWS OF CORPORATIONS* 609 n.5 (3d ed. 1983).

222. RESTATEMENT (SECOND) OF AGENCY § 219(1) cmt. a (1958).

223. See *id.* § 219(2)(b).

Based on similar policy considerations,²²⁴ the law of contracts provides that an agent's acts—although unauthorized—nevertheless bind the principal and can subject the principal to liability so long as the agent was acting with apparent authority.²²⁵ Even in the absence of apparent authority, the unauthorized acts of a general agent—which presumably would include any full-time employee²²⁶—bind the principal so long as they are incidental to, or typically a part of, the tasks the agent is authorized to perform.²²⁷ Imposing liability on the principal for “the mistakes or overzealousness” of its agents is considered appropriate in order to “stimulate[] the watchfulness of the employer in selecting and supervising . . . [its] agents.”²²⁸

In the area of securities law, any “controlling person” is jointly and severally liable for the acts of those within her control.²²⁹ Although strict vicarious liability is not imposed in such cases, the controlling person has a defense only if she “maintained and enforced a reasonable and proper system of supervision and internal control”²³⁰—and she has the burden of proving that defense.²³¹

Thus, the law governing Section 1983 is somewhat aberrational in that it has created barriers making it difficult to sue *both* public employers and supervisory officials.²³² Nothing in the language or legis-

224. See *id.* § 161 cmt. a.

225. See *id.* § 159.

226. See *id.* § 161 cmt. a (defining a “special agent” as one who is “employed only to conduct individually distinct transactions” and who is not, therefore, “in any sense a part of the business organization of the principal”).

227. See *id.* § 161.

228. WARREN A. SEAVEY, *HANDBOOK OF THE LAW OF AGENCY* § 58 (1964).

229. See THOMAS L. HAZEN, *THE LAW OF SECURITIES REGULATION* 368 (3d ed. 1996). The Securities and Exchange Commission's definition of “control”—“the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise,” 17 C.F.R. § 230.405 (1996)—presumably includes any policy-making officer. See HAZEN, *supra*, at 253; see also *Harrison v. Dean Witter Reynolds, Inc.*, 974 F.2d 873, 881 (7th Cir. 1992) (noting that the question whether the defendant was a “controlling person” depends on whether she “exercised control over[] the operations of the [controlled] person in general, . . . possessed the power or ability to control the specific transaction or activity upon which the primary violation was predicated, [and] whether or not that power was exercised”), *cert. denied*, 509 U.S. 904 (1993).

230. *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1576 (9th Cir. 1990) (en banc), *cert. denied*, 499 U.S. 976 (1991); *Marbury Management, Inc. v. Kohn*, 629 F.2d 705, 716 (2d Cir.), *cert. denied*, 449 U.S. 1011 (1980). See generally *Securities Exchange Act of 1934* § 20(a), 15 U.S.C. § 78t(a) (1994) (imposing liability on a controlling person unless she “acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action”); *Securities Act of 1933* § 15, 15 U.S.C. § 77o (1994) (imposing liability on a controlling person unless she lacked any “knowledge of or reasonable ground to believe in the existence of the facts” on which her liability is allegedly based).

231. See HAZEN, *supra* note 229, at 368. The “lack of knowledge” defense available to controlling persons “relate[s] to the basic facts underlying the course of business” and therefore does not automatically provide a defense simply because the defendant “lack[s] knowledge of the particular transaction.” *Id.*

232. See Laura Oren, *Immunity and Accountability in Civil Rights Litigation: Who Should Pay?*, 50 U. PITT. L. REV. 935 (1989) (criticizing the Supreme Court for developing the law governing individual immunities and municipal liability in isolation, without acknowledging the cumulative effect of each set of cases on the scope of Section 1983); cf. Mark R. Brown, *Correlat-*

lative history of Section 1983 justifies this anomaly,²³³ and it undermines the statute's compensatory and deterrent aims.

One obvious solution to this anomaly is to change the rules governing the liability of employers in Section 1983 cases and to make governmental entities vicariously liable for the constitutional misdeeds of their employees. This approach would require the Court (or Congress) to overrule—or the lower courts to ignore—*Monell's* official policy and custom requirement for municipal liability as well as the Court's holdings that states are not subject to suit under Section 1983.²³⁴ Although these rulings have not escaped criticism,²³⁵ the Court does not seem inclined to depart from them. Therefore, the alternative tack is to create a standard of supervisory liability that provides a meaningful remedy to those whose rights were violated as well as a meaningful deterrent to future constitutional violations.

In light of the Court's unwillingness to subject cities to respondeat superior liability,²³⁶ the fact that the one statement the Court has made about supervisory liability rejected vicarious liability in that context as well,²³⁷ and the causation requirement expressly contained in Section 1983,²³⁸ it seems unlikely that the Court will be willing to endorse vicarious liability for supervisors. But any standard requiring culpability on the part of the supervisor, including negligence, is faithful to the Court's precedents and the causation requirement. As discussed above, a supervisor who is negligent—who fails to exercise reasonable care in training, supervising, or disciplining her subordinates—is responsible in some causative sense for their constitutional misdeeds,²³⁹ and requiring proof of personal fault would assuage the Court's concerns about strict liability.²⁴⁰

ing *Municipal Liability and Official Immunity Under Section 1983*, 1989 U. ILL. L. REV. 625, 679-83 (advocating an inverse relationship between individual and municipal liability, so that the individual municipal employee is liable if the city is not, and vice versa); *Kramer & Sykes*, *supra* note 86, at 272-300 (suggesting a symmetrical approach to individual and municipal liability, such that a city is held liable either vicariously or on a showing of negligence for its employees' bad faith acts, but shares its employees' immunity for good faith acts).

233. See *supra* notes 42-45 and accompanying text.

234. See *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989) (holding that a state is not a "person" suable under Section 1983); *Quern v. Jordan*, 440 U.S. 332 (1979) (holding that Section 1983 was not intended to abrogate the states' Eleventh Amendment immunity).

235. For commentary critical of *Monell's* rejection of strict liability for cities, see *SCHUCK*, *supra* note 215, at 120; *Hoffman*, *supra* note 10, at 1518; *Schuck*, *supra* note 103; see also *supra* note 86. For commentary critical of *Quern*, see *Bruce McBirney*, Note, *Quern v. Jordan: A Misdirected Bar to Section 1983 Suits Against States*, 67 CAL. L. REV. 407 (1979). For commentary critical of *Will*, see *Ann Althouse*, *Tapping the State Court Resource*, 44 VAND. L. REV. 953, 972-73 (1991); *Jack M. Beermann*, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 99-100 (1989); *Lewis & Blumoff*, *supra* note 45, at 827.

236. See *supra* notes 21-22 and accompanying text.

237. *Rizzo v. Goode*, 423 U.S. 362, 371 (1976); see *supra* note 17 and accompanying text.

238. See *supra* note 5.

239. See *supra* notes 103 and 181 and accompanying text.

240. See *supra* notes 104-05 and accompanying text.

Moreover, a negligence standard best serves Section 1983's compensatory and deterrent purposes. On the most basic level, negligence is, of course, a lesser standard of culpability than the various standards currently in effect in the federal courts and therefore more likely to lead to a verdict favorable to those who have suffered constitutional injury. But in addition, by imposing liability in any case where the supervisor acted unreasonably and was therefore culpable, a negligence standard may avoid some of the difficult line-drawing that is involved in applying the current standards of liability and that may account for the inconsistencies in the case law. Simple negligence, gross negligence, reckless and deliberate indifference, and knowledge and acquiescence are all points on the continuum of culpability, and the lines that separate them are relatively fine.²⁴¹ Imposing supervisory liability on proof of negligence not only relieves the courts of the onerous task of drawing those distinctions, but also precludes the courts from concluding—based on little more than *ipse dixit*—that a culpable supervisor was negligent, or possibly even grossly negligent, but did not meet the higher standard of reckless or deliberate indifference, or knowledge and acquiescence, in place in that jurisdiction.²⁴²

Any countervailing policy considerations are adequately served by rejecting strict liability and affording supervisors a qualified immunity defense. For example, some courts and commentators have pointed out that supervisory officials working in the public sector often do not have the same ability to hire and fire subordinates enjoyed by their counterparts in the private sphere,²⁴³ and therefore it may seem unfair to hold public sector supervisors accountable for the constitutional transgressions of their subordinates. But given the protections already afforded by the qualified immunity defense, this concern for fairness does not require that the courts erect a standard of supervisory liability higher than negligence.²⁴⁴

241. See *supra* note 34.

242. For examples of such cases, see *Febus-Rodriguez v. Betancourt-Lebron*, 14 F.3d 87, 93, 94, 95 n.11 (1st Cir. 1994); *Wilson v. City of Chicago*, 6 F.3d 1233, 1240 (7th Cir. 1993), *modified on other grounds*, Nos. 89-3747 & 90-2216, 1993 U.S. App. LEXIS 31896 (7th Cir. Dec. 8, 1993), *cert. denied*, 114 S. Ct. 1844 (1994); *Gates v. Unified Sch. Dist. No. 449*, 996 F.2d 1035, 1043 (10th Cir. 1993); *Bowen v. City of Manchester*, 966 F.2d 13, 21 (1st Cir. 1992); *Manarite by Manarite v. City of Springfield*, 957 F.2d 953, 958 (1st Cir. 1992); *Sanders v. English*, 950 F.2d 1152, 1159 (5th Cir. 1992); *Jane Doe "A" v. Special Sch. Dist.*, 901 F.2d 642, 646, 647 (8th Cir. 1990).

243. See, e.g., 1 NAHMOD, *supra* note 23, at 239; Brown, *supra* note 25, at 118 (citing cases). But cf. Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1131-32 (1980) (questioning the distinction between public and private managers).

244. For a response to the argument that supervisors should not be held to a higher standard than their subordinates, see Brown, *supra* note 25, at 114-19.

As noted above, the defense of qualified immunity already shields executive branch²⁴⁵ officials from damages²⁴⁶ liability unless the constitutional rights asserted by the plaintiff were "clearly established . . . rights of which a reasonable person would have known."²⁴⁷ The Supreme Court created the qualified immunity defense in order to protect public officials from being sued for every error in judgment, thereby diverting their attention from their public responsibilities and impeding the independent exercise of their discretion.²⁴⁸ The defense has been structured so as to accommodate the conflicting policies of remedying and deterring constitutional violations while at the same time protecting public officials,²⁴⁹ and that defense ought to provide a sufficient shield for supervisory officials as well.²⁵⁰

As I have argued elsewhere, the qualified immunity inquiry ought to focus on whether a reasonable public official in the defendant's position would have realized that the plaintiff's constitutional rights were being violated.²⁵¹ That question might not be resolved in the same way for a subordinate and a supervisory official: what these two officials can reasonably be expected to know about the plaintiff's constitutional rights might differ if, for example, they do not have the same access to legal advice, their actions and decisions are subject to differ-

245. See *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). Although the qualified immunity defense is available only to executive branch officials, other state officials—judges, prosecutors, and legislators—enjoy the even broader defense of absolute immunity, which protects them from liability so long as they were acting within the bounds of the protected function. See *Stump v. Sparkman*, 435 U.S. 349 (1978) (judges); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (prosecutors); *Tenney v. Brandhove*, 341 U.S. 367 (1951) (legislators).

246. The individual immunity defenses available in Section 1983 suits are normally inapplicable in suits seeking only declaratory or injunctive relief. See *Pulliam v. Allen*, 466 U.S. 522, 528-42 (1984) (refusing to extend absolute judicial immunity to such suits); *Harlow*, 457 U.S. at 819 n.34 (limiting its holding, which modified the qualified immunity defense, to damages cases). Although the Supreme Court has not expressly ruled on the availability of the qualified immunity defense in injunctive suits, see *id.*, the courts of appeals have generally refused to recognize the defense in such cases. See Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597, 600 n.13 (1989) (collecting cases).

Despite the unavailability of the qualified immunity defense, the Supreme Court has erected a number of other barriers to injunctive relief that serve the federalism and other interests underlying qualified immunity. See *supra* note 16. Perhaps as a result of these barriers, most Section 1983 suits filed against individual defendants seek damages rather than injunctive relief. See *Lewis & Blumoff*, *supra* note 45, at 759 n.18; cf. *City of Riverside v. Rivera*, 477 U.S. 561, 575 (1986) (observing that "injunctive relief generally is unavailable . . . in the area of individual police misconduct").

247. *Harlow*, 457 U.S. at 818.

248. See *id.* at 807, 813-14; *Wood v. Strickland*, 420 U.S. 308, 319-20 (1975). In fact, the Court in *Harlow* expanded the scope of the defense so as to protect public officials from "broad-ranging discovery" that the Court considered "peculiarly disruptive of effective government," to "avoid excessive disruption of government," and to "permit the resolution of many insubstantial claims on summary judgment." *Harlow*, 457 U.S. at 817-18.

249. See *Harlow*, 457 U.S. at 807, 813-14.

250. See *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (noting that qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law").

251. See Kinports, *supra* note 246, at 618-34.

ent constraints, or they are acting under different time pressures.²⁵² If, given these factors, the law was such that a reasonable public official in the supervisor's position would not have known that *her subordinate's* conduct violated the plaintiff's constitutional rights, then the supervisor should be protected by the qualified immunity defense.²⁵³

Under the negligence standard of culpability advocated in this article—when combined with Section 1983's causation requirement and the qualified immunity defense—a supervisor would be accountable for her subordinate's constitutional wrongdoing only if three conditions were met. First, she must have been negligent: she must have failed to act reasonably in supervising, training, or disciplining the subordinate. Second, the plaintiff's constitutional injury must have been a foreseeable result of her negligence, so that her negligence can be deemed a legal cause of the violation. And finally, she must not be entitled to qualified immunity, that is, the law must be clear enough that she could reasonably have been expected to realize that her subordinate's actions were unconstitutional. Imposing liability in

252. See *id.* at 622-30.

253. It makes little sense to say, as some courts do, that a supervisor should be entitled to qualified immunity unless a reasonable public official in her position would have realized that *her own* conduct violated the plaintiff's constitutional rights. See, e.g., *Dolihite v. Maughon*, 74 F.3d 1027, 1054 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 185 (1996); *Greason v. Kemp*, 891 F.2d 829, 836 (11th Cir. 1990); *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 726, 730 (3d Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990). The cases that are the focus of this article are those where the supervisor did not *herself* violate the plaintiff's rights—or order, authorize, or otherwise participate directly in the violation—but where it was her subordinate who did so. Assuming that a reasonable public official in the supervisor's position would have realized that her subordinate's conduct infringed the plaintiff's rights, and assuming, in addition, that the standard of supervisory liability in effect in the particular jurisdiction is met, then, by definition, a reasonable supervisor would have known that her own conduct would "cause[] [the plaintiff] to be subjected" to a constitutional injury within the meaning of Section 1983. Therefore, the supervisor can fairly be subjected to liability without undermining any of the policy reasons underlying the qualified immunity defense.

Likewise, it is wrong for the courts to say, as some currently do, that a supervisor is entitled to qualified immunity if the standard of supervisory liability was not clearly established at the time of the constitutional violation or if it was not clearly established that the supervisor failed to meet that standard. See *Adams v. Poag*, 61 F.3d 1537, 1544 (11th Cir. 1995) (noting that supervisor is entitled to immunity unless a reasonable person in her position would understand that her shortcomings constituted deliberate indifference); *Belcher v. City of Foley*, 30 F.3d 1390, 1398 (11th Cir. 1994) (granting police chief qualified immunity because "no decisions . . . clearly establish that [his] failure to train his officers amounted to deliberate indifference"); *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 454-56 (5th Cir.) (en banc) (stating that supervisors are entitled to immunity if their duty not to be deliberately indifferent to the plaintiff's rights was not clearly established), *cert. denied*, 115 S. Ct. 70 (1994); *Stoneking*, 882 F.2d at 730 (noting that it was clearly established that a supervisor could not condone or authorize unconstitutional conduct). These formulations of the qualified immunity standard confuse the immunity defense with the standard of supervisory liability; it is the plaintiff's constitutional rights that must be clearly established, not the supervisor's deliberate indifference or the law governing the standard of supervisory liability. See *Lipsett v. University of P.R.*, 759 F. Supp. 40, 56 & n.15 (D.P.R. 1991). Proof that satisfies whatever standard of supervisory liability the court has chosen—when combined with proof that the plaintiff's rights were clearly established at the time of the violation, so as to defeat the qualified immunity defense—ought to be a sufficient basis on which to hold the supervisor accountable for the violation.

cases where these three conditions are met affords supervisory officials adequate protection and avoids chilling legitimate official activity, while at the same time serving Section 1983's goals of compensating the victims of constitutional violations and deterring constitutional misconduct.

V. CONCLUSION

The beating of Rodney King has been called " 'the defining incident in police brutality.' "²⁵⁴ Unfortunately, there has not yet been a comparable defining moment for the law governing a supervisor's responsibility for her subordinate's constitutional wrongdoing. Although the question of supervisory liability came to the fore at the time of the King beating, and continues to arise frequently in Section 1983 litigation, it has received little attention from either Congress or the Supreme Court. The only guidance on this issue that can reasonably be gleaned from the language of Section 1983, its legislative history, and the relevant Supreme Court precedents is that supervisory officials should not be held liable on a theory of respondeat superior. Beyond that, the lower federal courts have been left largely on their own to devise a standard of supervisory liability for Section 1983 cases. In so doing, the courts of appeals have not spoken with one voice, either in articulating the applicable standard or in implementing the various standards they have chosen.

The inconsistencies that plague this area of the law ought to be reconciled so as to provide a uniform standard of supervisory liability, as well as guidance to the public officials who are bound by that standard. Towards that end, this article recommends that supervisors be held to a negligence standard. Given the protections already afforded public officials by the qualified immunity defense, a negligence test best accommodates the relevant competing goals: on the one hand, providing a meaningful remedy to those whose constitutional rights have been violated and a meaningful deterrent to constitutional misconduct, and, on the other hand, shielding blameless public officials from liability and protecting state and local governments from unnecessary intrusions by the federal judiciary.

254. Mydans et al., *supra* note 1, at A1 (quoting Jerome Skolnick, professor of law and sociology).